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Nat Stern[*]

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INTRODUCTION

One of the odd ambiguities of defamation doctrine is the Supreme Court's enduring silence on the exact scope of plaintiffs' constitutional burden to demonstrate falsity. Most notably, the Court in *Milkovich v. Lorain Journal Co.*[1] described its decision in *Philadelphia Newspapers, Inc. v. Hepps*[2] as holding that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved."[3] The proposition's twofold qualification, extending its reach only to expression by media defendants on subjects of public concern, implies that the absence of either element may eliminate the plaintiff's obligation to show that the statement in question contains a factually false assertion. Admittedly, the notion of variable standards of proof has played a central part in the development of defamation standards under the First Amendment.[4] This Article contends, however, that the logic justifying contingent burdens elsewhere in libel law should not apply to the underlying question of whether a defendant falsely maligned the plaintiff. In particular, the Article argues that adjustments to the evidentiary barriers faced by defamation plaintiffs have been shaped by considerations beyond the inherent nature of defamation, whereas provably false content should be recognized as an integral feature of actionable libel. Accordingly, neither the subject matter of the expression at issue nor the identity of the defendant should affect the requirement that the plaintiff establish falsity.

Part I of the Article reviews the evolution of constitutional principles governing defamation through the prism of external and intrinsic factors. Part II explores the apparent rationale for the suggestion in *Milkovich* and other cases that demonstration of falsity may be waived in certain circumstances, and argues that this position rests on failure to recognize the intrinsic character of defamatory content. An examination in Part III of lower court decisions since *Milkovich* underscores the irrelevance of public concern classification and media status to the determination of falsity.

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[1] 497 U.S. 1 (1990). The case is discussed *infra* at Part II-A.

[2] 475 U.S. 767 (1986).

[3] *Milkovich*, 497 U.S. at 19-20.

[4] *See infra* notes 9-20 and accompanying text.

I. THE PREDOMINANCE OF EXTRINSIC FORCES IN THE FORMATION OF LIBEL DOCTRINE UNDER THE FIRST AMENDMENT

Since according libel First Amendment recognition in *New York Times Co. v. Sullivan*,[5] the Supreme Court has pursued a "proper accommodation"[6] between society's interest in the free dissemination of ideas and information and the state interest in redressing harm to reputation.[7] That balance has been struck primarily through evidentiary standards rooted in values external to the nature of defamatory expression itself. In launching modern constitutional libel doctrine, the *New York Times* opinion epitomized the Court's emphasis on extrinsic reasoning. Still, a distinct strain of rulings has revolved around the threshold question of whether the disputed statement can be shown to qualify as actionable defamation at all. In these instances, the Court has focused on aspects of the speech in question that may be properly regarded as intrinsic: i.e., whether the speech possesses the properties of constitutionally unprotected defamation.[8]

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[5] 376 U.S. 254 (1964). The case is discussed *infra* at Part I-A.

[6] Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974) (referring to an attempt to strike a balance between freedoms of speech and press and redressing harm caused to reputation).

[7] *See* Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976) (noting the Court's effort to reach an "appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances"); Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (stating that actions for damages from defamatory falsehoods reflect "no more than our basic concept of the essential dignity and worth of every human being"); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 737 (4th ed. 1971) (noting individual's interest in redressing "invasion of the interest in reputation and good name").

[8] *See* Robert Francescotti, *How to Define Intrinsic Properties*, 33 NOÛS 590, 590 (1999) (describing intrinsic property as "a property that is *internal* in the sense that whether an object has it depends entirely upon what the object is like *in itself*"); Peter P. Kirschenmann, *"Intrinsically" or Just "Instrumentally" Valuable? On Structural*

A. New York Times*, the Constitutionalization of Libel Law, and the Extrinsic Thrust of Defamation Doctrine*

New York Times launched the Court's project of fashioning a regime of constitutional principles to govern defamation law.[9] Prior to 1964, the Court had categorically excluded libel from the realm of protected expression.[10] Libel defendants could therefore look only to the meager safeguards afforded by state common law. In most jurisdictions, defendants were subjected to strict liability unless they could prove that the statement

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Types of Values of Scientific Knowledge, 32 J. GEN. PHIL. SCI. 237, 243 (2001) (stating that "things possess *intrinsic* value on the ground that the source of their value lies in them: they are valued *in* themselves"); David Lewis, *Extrinsic Properties*, 44 PHIL. STUD. 197, 197 (1983) (characterizing "[a] sentence or statement or proposition that ascribes intrinsic properties to something is entirely about that thing"); Stuart Rachels, *A Defense of Two Optimistic Claims in Ethical Theory*, 112 PHIL. STUD. 1, 2-3 (2003) (stating that "[a]n item's intrinsic value . . . depends only on that thing. Perfect duplicates cannot differ in intrinsic value"); Peter Vallentyne, *Intrinsic Properties Defined*, 88 PHIL. STUD. 209, 212 (1997) (defining intrinsic properties as "those the having, or lacking, of which does not depend on what the rest of the world is like").

[9] The complexity of that regime has evoked a considerable amount of critical commentary by both judges and scholars. *See, e.g.*, Mittelman v. Witous, 552 N.E.2d 973, 978 (Ill. 1989) (stating that law of defamation "has spawned a morass of case law in which consistency and harmony have long ago disappeared"); Holtzscheiter v. Thomson Newspapers, Inc., 506 S.E.2d 497, 514 (S.C. 1998) (Toal, J., concurring) (asserting that "the present status of our defamation jurisprudence is so convoluted, so hopelessly and irretrievably confused, that nothing short of a fresh start can bring any sanity, and predictability, to this very important area of the law"); Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 293 (1994) (describing the Court's jurisprudence as contributing to the "disarray" and "chaotic nature" of defamation law); Sheldon W. Halpern, *Of Libel, Language, and Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.C. L. REV. 273, 276 (1990) (characterizing defamation law as "[a] fragmented, confusing and unsatisfying array of criteria and requirements"); David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493, 515 (1990) (asserting that the law of defamation "would make Daedalus proud"); Rodney A. Smolla, Dun & Bradstreet*,* Hepps*, and* Liberty Lobby*: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1519 (1987) (stating that the law of defamation is "dripping with contradictions and confusion").

[10] *See, e.g.*, Times Film Corp. v. Chicago, 365 U.S. 43, 48 (1961); Beauharnais v. Illinois, 343 U.S. 250, 256-57, 266 (1952) (stating that libelous speech is not "within the area of constitutionally protected speech"); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating in dictum that libelous statements "are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

was either true or privileged.[11] Rejecting any premise of libel's "talismanic immunity from constitutional limitations,"[12] *New York Times* dramatically altered the landscape of defamation law by granting formidable protection to criticism of public officials. Under the decision's "actual malice" requirement, an official could recover damages for a defamatory falsehood relating to official conduct only upon a showing that the defendant either knew that the statement was false or acted with reckless disregard of whether it was false.[13] In addition, the Court fortified this imposing evidentiary barrier by demanding that the official establish actual malice with "convincing clarity" rather than simply by a preponderance of the evidence.[14]

The Court's promulgation of the actual malice standard did not rest on principles peculiar to the nature of defamatory expression. On the contrary, the Court announced at the outset of its discussion a refusal to be bound by "mere labels" such as "libel."[15] Rather, the Court repeatedly emphasized the larger importance of preserving citizens' ability to criticize the official conduct of public officials.[16] Citing the authority of Madison, the Court ascribed to him the view that "[t]he right of free public discussion of the stewardship of public officials" is "a fundamental principle of the American form of government."[17] Indeed, in an oft-quoted passage, the Court discerned in this right "the central meaning of the First Amendment."[18] Thus, the burden of showing actual malice was deemed necessary to safeguard the liberty and duties of the "citizen-critic of government."[19] Absent such protection, those who would criticize official conduct "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[20]

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[11] *E.g.*, Peck v. Tribune Co., 214 U.S. 185, 189 (1909) (stating that "[i]f the publication was libelous, the defendant took the risk"); McClinton v. Rice, 265 P.2d 425, 429-30 (Ariz. 1953); Horovitz v. Weidenmiller, 53 N.Y.S.2d 379, 389 (N.Y. Sup. Ct. 1945); Woolley v. Hiner, 100 P.2d 608, 610-11 (Or. 1940); *see* RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:4 (2d ed. 2010) (characterizing defamation under common law as "essentially a strict liability tort with most rules stacked in the plaintiff's favor"). *See generally* Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1351-64 (1975) (discussing strict liability as a feature of the common law of defamation prior to 1964).

[12] New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

[13] *Id.* at 279-80.

[14] *Id.* at 285-86.

[15] *Id.* at 269.

[16] *Id.* at 268, 273, 279, 282.

[17] *Id.* at 275.

[18] *Id.* at 273.

The actual malice requirement, then, emerged as an instrument to foster "public debate,"[21] not as an inevitable outgrowth of defamation's essence. In framing its adoption of the rule against the backdrop of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[22] the Court voiced a theme that has long transcended the context of libel. The idea that speech on public matters lies at the heart of the First Amendment has been invoked to overturn restrictions based on a variety of rationales.[23] Thus, the aims of insulating broadcast stations from political pressure and avoiding misleading impressions of government endorsement could not justify a ban on editorials by stations receiving federal funds;[24] invalidating the prohibition, the Court observed that communication regarding matters of public importance "is entitled to the most exacting degree of First Amendment protection."[25] Similarly, in *First National Bank v. Bellotti*,[26] the Court found Massachusetts's aim of curbing inordinate corporate influence insufficient to sustain its sweeping restrictions on corporations' spending to influence state referendums.[27] This limitation on discussion of governmental affairs struck at "speech indispensable to decisionmaking in a democracy."[28] The rejection of restraints on speech of public moment in other settings, as well, points to an origin of actual malice outside the distinctive features of libel.[29]

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[19] *Id.* at 282.

[20] *Id.* at 279; *see id.* at 278 (raising specter that succession of judgments for libel would cast a "pall of fear and timidity . . . upon those who would give voice to public criticism").

[21] *Id.* at 279.

[22] *Id.* at 270.

[23] Much scholarly commentary has also endorsed the proposition that speech on matters of public importance occupies a privileged position under the First Amendment. Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN L. REV. 299, 300-01 (1978) (asserting that First Amendment "in principle" protects only "political speech"); Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model that Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 514-17 (2007); Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 208 (noting the historical importance of free public speech regarding "the stewardship of public officials"); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57 (identifying freedom to discuss public issues as crucial to the informed judgment that is necessary for voting, which is the process by which the public governs).

[24] FCC v. League of Women Voters, 468 U.S. 364, 395 (1984) (concluding that the "broad ban on all editorializing by every station that receives [federal] funds far exceeds what is necessary to protect against the risk of governmental interference or to

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prevent the public from assuming that editorials by public broadcasting stations represent the official view of government").

[25] *Id.* at 375-76.

[26] 435 U.S. 765 (1978).

[27] *Id.* at 789.

[28] *Id.* at 777.

[29] *See, e.g.*, Citizens United v. Federal Election Comm'n, 130 S. Ct. 876, 913 (2010) (striking down federal statute prohibiting independent corporate expenditures for "electioneering communications" within 30 days of a primary election or 60 days of general election for federal office); *id.* at 898 (stating that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it"); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999) (invalidating certain restrictions on circulation of ballot-initiative petitions); *id.* at 211 (asserting that the First Amendment "guards against the State's efforts to restrict free discussions about matters of public concern"); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (finding that floating buffer zones imposed by district court around people entering abortion clinics excessively burdened speech); *id.* at 377 (observing that "[l]eafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment"); Carey v. Brown, 447 U.S. 455, 455 (1980) (striking down statute forbidding picketing of residences but providing exemption for the "peaceful picketing of a place of employment involved in a labor dispute"); *id.* at 466 (characterizing "[p]ublic-issue picketing" as "'an exercise of . . . basic constitutional rights in their most pristine and classic form'" (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963))); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (overturning dismissal of public school teacher for letter to newspaper criticizing school board's manner of addressing proposals to raise revenue for schools); *id.* at 573 (referring to the "public interest in having free and unhindered debate on matters of public importance" as the "core value" of the Free Speech Clause); Mills v. Alabama, 384 U.S. 214 (1966) (invalidating ban on publishing editorial on election day urging citizens to vote certain way on issues on ballot); *id.* at 218 (declaring that a "major purpose" of the First Amendment was "to protect the free discussion of governmental affairs"); Stromberg v. California, 283 U.S. 359, 361 (1931) (reversing conviction under statute that banned public display of red flag as, *inter alia*, a "sign, symbol or emblem of opposition to organized government"); *id.* at 369

Expanded application of the actual malice requirement in the wake of *New York Times* underscores the standard's roots in solicitude for speech on public topics rather than in libel's organic nature. The Court ruled in *Garrison v. Louisiana*[30] that, like the civil action in *New York Times*, criminal prosecutions for libel must also demonstrate that the defendant acted with knowledge or reckless disregard of falsity.[31] Again, the Court's imposition of this evidentiary obstacle where the falsehood pertains to official conduct sprang from its wider philosophy of shielding speech concerning public affairs. Such speech, declared the Court, "is more than self-expression; it is the essence of self-government."[32] This democratic rationale also informed the *Garrison* Court's far-reaching conception of speech regarding officials falling within the ambit of the actual malice standard. Because the *New York Times* rule was designed to protect "the paramount public interest in a free flow of information to the people concerning public officials," the Court deemed "anything which might touch on an official's fitness for office" sufficient to trigger the rule.[33]

Further extension of the actual malice standard in *Curtis Publishing Co. v. Butts*[34] to libel plaintiffs deemed "public figures"[35] likewise revolved around the vital need to preserve dis-

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(describing "maintenance of the opportunity for free political discussion" as a "fundamental principle of our constitutional system").

[30] 379 U.S. 64 (1964).

[31] *Id.* at 74.

[32] *Id.* at 74-75; *see also id.* at 75 (indicating that a "calculated falsehood" would not enjoy protection because "the use of the known lie as a tool [for political ends] is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected").

[33] *Id.* at 77; *see* Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971) (holding that public official or candidate for office bringing libel suit over a charge of criminal conduct must always show actual malice); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300 (1971).

[34] 388 U.S. 130 (1967). The Court also handed down a decision in the companion case of Associated Press v. Walker. *Id.* at 130, 140-42 (plurality opinion of Harlan, J.) (noting companion case of *Walker* and discussing facts of *Walker*).

[35] *Id.* at 164 (Warren, C.J., concurring in result) (stating that actual malice requirement should apply to "public figures"). No opinion in *Butts* commanded a majority of Justices; the establishment of the actual malice standard for public figures resulted from a somewhat intricate aggregation of opinions. *See* Harry Kalven, Jr., *The Reason-*

course on significant public matters. Justice Harlan's plurality opinion rejected the assumption that "'criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of government officials.'"[36] Rather, the opinion indicated, public figures could derive their status from either having attained a position that commands public interest or having thrust their personality "into the 'vortex' of an important public controversy."[37] In his crucial concurring opinion,[38] Chief Justice Warren similarly repudiated a wholesale distinction between public officials and private individuals. Private persons designated as public figures, he noted, "often play an influential role in ordering society" comparable to that of public officials.[39] Accordingly, adherence to the actual malice standard in libel suits by such individuals is needed to vindicate citizens' interest in "uninhibited debate about [public figures'] involvement in public issues and events."[40]

The Court's subsequent decision in *Monitor Patriot Co. v. Roy*[41] confirmed that the scope of the actual malice standard would be shaped by imperatives of core free speech tenets rather than internal constraints of defamation doctrine. Roy brought his libel suit over an attack against him in his capacity as a candidate for elective public office. In determining whether Roy would be subjected to the actual malice requirement, the Court professed indifference as to classification of his formal status as a public official or public figure.[42] Rather, his consti-

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able Man and the First Amendment: Hill, Butts, *and* Walker, 1967 SUP. CT. REV. 267, 275-78 (explaining how a combination of separate opinions produced this holding).

[36] 388 U.S. at 147-48 (plurality opinion of Harlan, J.) (quoting Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 196 (8th Cir. 1966)).

[37] *Id.* at 155 (citation omitted).

[38] *See* Kalven, *supra* note 35, at 277 (noting that Chief Justice Warren's concurrence "save[d] the plaintiff's verdict").

[39] 388 U.S. at 164 (Warren, C.J., concurring in result); *see id.* at 163-64 (noting individuals outside of government who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large").

[40] *Id.* at 164.

[41] 401 U.S. 265 (1971).

[42] *See id.* at 271.

tutional burden would be governed by the fundamental principle that the First Amendment was "'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,'"[43] and by its corollary that "'it is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.'"[44] Understood in this light, *Garrison*'s rationale for a capacious view of "official conduct" under the *New York Times* ruling[45] was obtained "with special force" in the case of expression bearing on the fitness of candidates.[46] Indeed, the Court hesitated to exclude any aspect of a candidate's life from the reach of the actual malice standard.[47]

Other Court pronouncements during this period clarified the actual malice requirement without altering its function as a strategic device to effectuate protection of speech on subjects of public import. In addition to extending the *New York Times* rule to the criminal context, the *Garrison* Court addressed whether evidence that the defendant's defamatory statement was motivated by hostility toward the complainant qualifies as actual malice. Concerned that "[d]ebate on public issues" would be dampened by allowing malice in this ordinary sense to suffice,[48] the Court insisted on proof of knowledge of falsity or thoroughgoing indifference or deep doubt about the truth of the publication.[49] The Court further reinforced a rigorous standard for actual malice, and its underpinnings in the promotion of discourse on public issues, in *St. Amant v. Thompson*.[50] There, the Court explained that recklessness is not gauged by "whether a reasonably prudent man would have published, or would have investigated before publishing" the defendant's defamatory falsehood.[51] Allowing recovery on such a showing would induce "self-censorship" and thus fail adequately to safeguard "the stake of the people in public business and the conduct of public officials."[52] Rather, only proof that "the defendant in fact entertained serious doubts as to the truth of his publication" could "insure the ascertainment and publication of the truth about public affairs."[53]

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[43] *Id.* at 271-72 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[44] *Id.* at 271 n.3 (quoting Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908)).

[45] *See supra* notes 13-16 and accompanying text.

[46] *Monitor Patriot Co.*, 401 U.S. at 274; *accord* Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300-01 (1971) (stating that "[p]ublic discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case" for applying actual malice requirement).

[47] *See Monitor Patriot Co.*, 401 U.S. at 275 (stating that "it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks"). An earlier decision, *Time, Inc. v. Hill*, 385 U.S. 374 (1967), demonstrated perhaps even more vividly that the actual malice rule did not arise from intrinsic aspects of defamation by extending the rule beyond the confines of libel itself. Plaintiff Hill brought suit over a magazine's account of a play based in part on his family's ordeal as hostages of escaped convicts. *Id.* at 376-77. While the family in the play was depicted as suffering harsher treatment and exhibiting greater heroism than did the Hills, *id.* at 377-78, the magazine's account was found to have "'portrayed [the play] as a reenactment of the Hills' experience.'" *Id.* at 379 (citation omitted). Hill's successful claim in state court lay in false light invasion of privacy rather than defamation. *See id.* at 386-87; RESTATEMENT (SECOND) OF TORTS § 652B (1977) (describing this tort as occurring through public disclosure of false and "highly offensive" facts about an individual). In overturning Hill's damage award, the Court ruled that recovery for "false reports of matters of public interest" must be supported by proof that the defendant published the report with actual malice. *Time, Inc.*, 385 U.S. at 387-88.

A decade after *New York Times*, the Court's decision in *Gertz v. Robert Welch, Inc.*[54] deflected the expansionist trajectory of decisions like *Monitor Patriot* and *St. Amant*, but continued their reliance on extrinsic factors in calibrating evidentiary burdens. In particular, *Gertz* placed the Court's solicitude for the public dimensions of defamatory speech in a new framework. Overruling an earlier decision,[55] the Court held that plaintiffs characterized as private figures were exempted from the burden of showing actual malice to recover actual damages.[56] Rather, a private figure could establish liability by proving that the defendant who committed the defamatory falsehood had acted with negligence.[57] Under this new regime, only private figures seeking to recover presumed or punitive damages would be required to demonstrate actual malice.[58]

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[48] Garrison v. Louisiana, 379 U.S. 64, 73 (1964); *see id.* at 72-73 (asserting that in cases of criticism of public officials' conduct of public business, "the interest in private reputation is overborne by the larger public interest . . . in the dissemination of truth").

[49] *Id.* at 73 (ruling that "the great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing or reckless falsehood").

[50] 390 U.S. 727 (1968).

[51] *Id.* at 731.

[52] *Id.* at 731-32.

[53] *Id.*

[54] 418 U.S. 323 (1974).

[55] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (plurality opinion of Brennan, J.) (applying the actual malice requirement whenever alleged libel "involv[es] matters of public or general concern").

The Court's explanation for easing recovery by private figures again lay beyond the threshold question of whether the speech in question constituted defamation. As a major rationale, the Court determined that private figures as a rule have relatively little capacity to pursue self-help.[59] While public figures and public officials usually have access to the media, private individuals typically lack comparable means of counteracting false accusations.[60] This heightened vulnerability to injury thus renders the state's interest in protecting private persons' reputation commensurately greater.[61] Even more important to the Court was the "compelling normative consideration" that public officials and public figures have effectively assumed the risk of harm from defamatory falsehoods by "invit[ing] attention and comment."[62] Private individuals, by contrast, have not placed themselves in this position and thus have "relinquished no part of [their] interest in the protection of [their] own good name."[63]

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[56] *Gertz*, 418 U.S. at 347.

[57] *Id.* (allowing states to determine standard of liability "so long as they do not impose liability without fault").

[58] *Id.* at 349.

[59] *See id.* at 344.

[60] *See id.*

[61] *See id.*

[62] *Id.* at 344-45.

[63] *Id.* at 345; *see id.* (describing private individuals as "more deserving of recovery" than public officials and public figures). Similarly, the Court's scheme for classifying various types of public figures did not grapple with concerns over the defamatory content of the expression involved. On its face, the *Gertz* opinion recognizes three categories of public figures: all-purpose public figures, limited public figures, and involuntary public figures. *See id.* at 344-45. In practice, however, the status most frequently implicated in litigation is the limited public figure. *See* William M. Krogh, Comment, *The Anonymous Public Figure: Influence Without Notoriety and the Defamation Plaintiff*, 15 GEO. MASON L. REV. 839, 846-47 (2008). Whatever the designation in a given case, questions of the plaintiff's proper classification presuppose the defamatory nature of the speech at issue. *See, e.g.*, Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166-67 (1979) (finding that plaintiff falsely referred to as Soviet spy was private figure); Hut-

When the Court further enhanced private figures' ability to recover in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[64] considerations of truth and falsity were once more subordinated to ascertaining defendants' mindset. *Dun & Bradstreet* held that private figures could obtain presumed or punitive damages for speech not involving a matter of public concern without showing actual malice.[65] The decision rested squarely on the higher plane in First Amendment jurisprudence occupied by speech addressing matters of public concern.[66] Conversely, the "reduced constitutional value" of expression addressing matters of private concern affords states broader latitude to redress injury to reputation caused by defamation.[67]

A set of ancillary procedural rules developed by the Court further reflects an emphasis on defendants' awareness of falsity rather than its existence. Unsurprisingly, these rules have principally involved the question of actual malice. For example, a defendant is entitled to summary judgment when a public figure's opposing affidavit fails to support a reasonable inference of actual malice by clear and convincing evidence.[68] If a

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chinson v. Proxmire, 443 U.S. 111, 134-36 (1979) (concluding that scientist bringing suit for allegedly false statements regarding his research performed with government funding was not public figure); Time, Inc. v. Firestone, 424 U.S. 448, 454-57 (1976) (holding that prominent socialite involved in highly publicized divorce proceedings was private figure in suit over false report that husband's divorce petition had been granted on ground of socialite's adultery).

[64] 472 U.S. 749 (1985).

[65] *Id.* at 761 (Powell, J., plurality opinion). The case involved a credit report issued by Dun & Bradstreet falsely stating that Greenmoss had filed for bankruptcy. Taking into account the "'content, form, and context'" of the report, Justice Powell's plurality opinion concluded that it did not involve a matter of public concern. *Id.* at 761-63 (citation omitted). The Court found the limitation on recovery of presumed and punitive damages in *Gertz* inapplicable on the ground that *Gertz* involved defamation of a private individual on a matter of public concern. *Id.* at 751, 756-57; *id.* at 764 (Burger, C.J., concurring in judgment); *id.* at 774 (White, J., concurring in judgment).

[66] "The First Amendment interest . . . is less important than the one weighed in *Gertz.* We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" *Id.* at 758-59 (Powell, J., plurality opinion) (citations omitted).

[67] *Id.* at 761.

[68] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986).

public figure or public official prevails at trial, the appellate court must make an independent examination of the entire record to assure that a finding of actual malice is supported by such evidence.[69] Thus, the question of whether the evidence presented in a defamation case supports a finding of actual malice is ultimately a question of law.[70] Moreover, given the frequent centrality of the actual malice determination, the Court has sought to ensure libel plaintiffs' access to potentially relevant evidence. Most notably, the Court has authorized vigorous inquiry into the editorial processes of media defendants by plaintiffs seeking proof of knowledge of falsity or reckless disregard.[71]

B. Intrinsic Strains of Constitutional Defamation Doctrine

The prominence of the actual malice requirement in the *New York Times* opinion, with that standard's roots in larger First Amendment themes, did not thwart development of a substantive jurisprudence of libel. Indeed, the *New York Times* opinion contains seeds of interpretive principles governing the question of whether a statement amounts to actionable libel. These principles stand in contrast to the elaborate set of contingent evidentiary burdens based on plaintiffs' status, subject matter of the alleged libel, and state interest in protecting reputation. Rather, they represent limitations on libel suits inherent in the Court's understanding of libel itself.

The most obvious internal constraint on libel suits emerging from *New York Times* is the requirement that a defendant's statement be reasonably understood as referring to the plaintiff. Sullivan, a commissioner of Montgomery, Alabama, alleged that he had been libeled by an advertisement charging "Southern violators" with reprisals against civil rights demonstrators in the city.[72] Although the advertisement did not explicitly mention Sullivan, he contended that inaccurate accusations of misconduct against the police implicated him in his supervisory capacity over the Montgomery Police Department.[73] Apart from Sullivan's failure to show actual malice, the Court rejected the notion that the erroneous statements could be regarded as "'of and concerning'" Sullivan.[74] Two years later, in *Rosenblatt v. Baer*,[75] the Court reaffirmed that the "of and concerning" criterion forbids liability based on equivocal references to the plaintiff.[76] While both cases involved claims by government officials, the Court's logic was not confined to concern that their theory of liability could transform "an otherwise impersonal attack on governmental operations" into "a libel of those administering the operations."[77] Rather, it was the effort to construe alleged falsehoods about an indefinite part of a group as specific accusations against the plaintiff that proved fundamentally deficient.[78]

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[69] Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 499 (1984) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)).

[70] Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685 (1989).

[71] *See* Herbert v. Lando, 441 U.S. 153, 176 (1979).

[72] *New York Times*, 376 U.S. at 256-59.

The *New York Times* opinion also intimated a more far-reaching intrinsic restraint on the range of content susceptible to libel suits: the protection of speech that cannot fairly be characterized as asserting facts. Though immunity for expressions of opinion was later qualified in *Milkovich*,[79] *New York Times*'s reasoning implied a conception of libel's essential nature that remains substantially intact.[80] By requiring the presence of a "defamatory *falsehood*,"[81] the actual malice standard appeared to shield statements that could not be shown to be factually untrue. Moreover, the opinion cast its holding as granting constitutional protection for "honest misstatements of fact" while distinguishing "statements of fact" from "expression of opinion."[82] The impact of these passages on the intrinsic scope of actionable libel was limited by the case's focus on public official plaintiffs, and by the absence of a fully articulated doctrine of opinion. Nevertheless, their underlying logic supports the Court's subsequent repeated insistence on demonstrable factual falsity as a touchstone of libel.

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[73] *Id.* at 258.

[74] *Id.* at 288-92.

[75] 383 U.S. 75 (1966).

[76] *Id.* at 82-83.

[77] *Id.* at 80 (citing *New York Times*, 376 U.S. at 290-92).

[78] *See Rosenblatt*, 383 U.S. at 82 n.6 (discussing limitations on circumstances under which "a member of the group" that has been libeled may recover); Joseph H. King, Jr., *Reference to the Plaintiff Requirement in Defamatory Statements Directed at Groups*, 35 WAKE FOREST L. REV. 343, 348-53 (2000); Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 348 (2009).

[79] *See infra* text accompanying notes 130-34.

[80] *See infra* text accompanying notes 221-44 (discussing limited impact of *Milkovich* on lower courts' recognition of opinion privilege).

[81] 376 U.S. at 279 (emphasis added).

The first such indication of this theme appeared in *Greenbelt Cooperative Publishing Ass'n v. Bresler*,[83] when the Court dismissed a libel verdict against a newspaper for reporting statements that a real estate developer's negotiating strategy in seeking to extract concessions from the city represented "blackmail."[84] Noting that the newspaper's reports of the city council sessions where the statements were made were "accurate and full," the Court rejected the contention that readers would understand the article to be charging the developer with the criminal offense of blackmail.[85] Rather, given the context in which the term was reported, they would have "perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."[86] Admittedly, here as in *New York Times*, the public context of *Bresler* provides grounds for resisting a sweeping interpretation of a universal requirement of definite factual content. As the Court observed, the pejorative language in question was uttered in the course of "heated" public debates over a "controversial issue[]" that was "of substantial concern to all who lived in the community."[87] Thus, the holding could conceivably be construed to protect only statements made in fair reports of significant public meetings.[88] However, while the fevered atmosphere of the meetings may have increased the likelihood that readers would ascribe a non-legal meaning to "blackmail," nothing inherent in the idea of "rhetorical hyperbole" confines its application to exchanges in *Bresler* over matters of public importance. Rather, the reasoning by which the Court found the presence of hyperbole—"[a] figure of speech in which exaggeration is used for emphasis or effect"[89]—can be transplanted to any context suggesting that the speaker did not intend a literal meaning of a derogatory term. In deeming such subjective expression beyond the reach of libel suits, the Court bolstered the proposition that factually rebuttable assertions are an essential element of actionable defamation.

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[82] *Id.* at 292 n.30.

[83] 398 U.S. 6 (1970).

[84] *Id.* at 13.

[85] *Id.* at 13-14.

[86] *Id.* at 14.

[87] *Id.* at 13.

[88] *See* Jeffrey E. Thomas, Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CAL. L. REV. 1001, 1006 (1986).

A similar outcome in *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*,[90] notwithstanding its statutory basis, lends further credence to an intrinsic requirement of verifiable falsehood. *Letter Carriers* overturned a state judgment against a union for publishing a newsletter that described non-union members of the bargaining unit as "scabs" and "traitors."[91] As a formal matter, the Court held that federal labor law preempted the state's award of damages for these statements.[92] The Court's construction of that law, however, had inferred "'a congressional intent to encourage free debate on issues dividing labor and management.'"[93] Thus incorporating free speech principles under the First Amendment,[94] the Court determined that the "existence of falsehood" is the "*sine qua non* of recovery for defamation."[95] The absence of this crucial feature defeated the plaintiffs' claim, for readers would recognize that the newsletter had merely employed "rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join."[96] When used in "a loose, figurative sense" to register the union's disapproval of non-union workers, words like "traitor" could not plausibly be regarded as "representations of fact."[97] As in *Bresler*, a heated dispute of high visibility fostered a climate in which words conveying factual charges elsewhere would be viewed as only reflecting the speaker's harsh value judgment. Still, the contrast drawn by *Letter Carriers* between "[e]xpression of such an opinion" as the union's and statements that "'falsify facts'"[98] can be drawn in a multitude of other settings as well. While ascertaining meaning may sometimes pose interpretive challenges,[99] the vast reach of this distinction is consistent with the theory that provable factual falsity is an indispensable component of constitutionally cognizable libel.

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[89] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 888 (3d ed. 1992).

[90] 418 U.S. 264 (1974).

[91] *Id.* at 284.

[92] *Id.* at 282-87.

[93] *Id.* at 272 (quoting Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 62 (1966)).

[94] *Id.* at 280-82 (applying actual malice standard and imposing "same obligation" of independent examination of record as in First Amendment cases).

[95] *Id.* at 283.

Two other decisions, while addressing suits by public figures, rest on reasoning that buttresses a wider First Amendment requirement of definite factual misstatement as a predicate for recovery in libel. *Hustler Magazine v. Falwell*[100] did not formally present a defamation issue at all, but rather involved a claim for infliction of emotional distress by "a nationally known minister who has been active as a commentator on politics and public affairs."[101] However, the opinion relied heavily on libel jurisprudence[102] to dispose of the suit. Falwell had brought his complaint over an apocryphal "interview" with him that Hustler had obviously and expressly meant as a parody.[103] In overturning the award of damages to Falwell, the Court held that public figures and public officials could recover for infliction of emotional distress caused by publications like Hustler's parody only by showing that "the publication contains a false statement of fact which was made with 'actual malice.'"[104] The Court's holding is thus formally confined to public figure and public official plaintiffs, and its analysis likewise underscores the First Amendment's encouragement of "robust political debate."[105] However, these features of the Court's opinion appear more relevant to its state of mind requirement than to the deeper principle implicated. At bottom, it was the intangible nature of the injury's source that upset First Amendment tenets. Rather than question the authenticity of Falwell's asserted emotional harm, the Court rejected "outrageousness" of speech as the standard by which liability could be measured.[106] The Court's objection to the "inherent subjectiveness" of this standard[107] throws into sharp relief the burden that it placed on plaintiffs to show a false statement of fact. By imposing this burden for a cause of action that traditionally omitted proof of falsehood,[108] the Court implicitly strengthened the case for treating demonstration of falsity as an integral aspect of actions for libel.

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[96] *Id.* at 285-86.

[97] *Id.* at 284.

[98] *Id.* (quoting Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 295 (1943)).

[99] *See generally* Jeffrey E. Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 WAKE FOREST L. REV. 333 (1999). *See also* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 649-55 (1990); Peter Meijes Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303, 342-48 (1987); Diane Leenheer Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C. DAVIS L. REV. 359, 395-427 (1985).

[100] 485 U.S. 46 (1988).

[101] *Id.* at 47-48. The plaintiff had also brought a cause of action in defamation, but the jury found against him on this claim. *Id.* at 48.

[102] *See id.* at 51-53 (citing, *inter alia*, Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971), Garrison v. Louisiana, 379 U.S. 64 (1964), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

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[103] *Id.* at 48. In this parody of a well-known advertising campaign, Falwell was quoted to say that his "first time" had occurred in an outhouse during a drunken rendezvous with his mother. *Id.*

[104] *Id.* at 56.

[105] *Id.* at 51.

[106] *Id.* at 55 (stating that such a standard "runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience" (citation omitted)).

[107] *Id.*

[108] *See* Amsden v. Grinnell Mut. Reinsurance Co., 203 N.W.2d 252, 255 (Iowa 1972) (describing as elements of prima facie case intentional infliction of emotional distress "(1) Outrageous conduct by the defendant; (2) The defendant's intention of causing, or reckless disregard of the probability of causing emotional distress; (3) The plaintiff's suffering severe or extreme emotional distress; and (4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct" (citations and internal quotation marks omitted)); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 64 (5th ed. 1984) (setting forth elements to be established for recovery in action for intentional infliction of emotional distress: intent or recklessness, outrageous conduct, and severe mental distress).

Masson v. New Yorker Magazine, Inc.[109] also indirectly validates the centrality of proven factual falsehood to the intrinsic character of constitutionally permissible libel suits. Masson complained that an article based on his recorded interviews with a New Yorker reporter had "deliberately fabricat[ed] quotations ascribed to him."[110] Because Masson was designated a public figure, he was required to meet the actual malice standard.[111] He contended that the defendants acted with the requisite intent by presenting as quotations substantially paraphrased versions of statements that he had made during the interviews.[112] Addressing the broader issue, the Court declined to regard alteration of a speaker's words alone as sufficient evidence of actual malice.[113] Instead, deliberate alteration of the plaintiff's words amounts to knowledge of falsity only when the alteration materially changes the meaning of the statement.[114] This standard obviously affords more latitude for interpretation than factual determinations of whether Greenmoss Builders had filed for bankruptcy[115] or Elmer Gertz had belonged to the Marxist League for Industrial Democracy and participated in planning an attack on police at the 1968 Democratic Convention.[116] Nevertheless, the touchstone of liability under the *Masson* standard remains falsity, and the Court's refusal to equate deviation from a speaker's words with per se proof of actual malice reflects a conception of falsity that is functional rather than formalist.[117] Such a functionalist approach suggests that demonstration of falsity should not hinge on the identities of defendants or the subject matter of their defamatory speech.

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[109] 501 U.S. 496 (1991).

[110] Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1537 (9th Cir. 1989), *rev'd*, 501 U.S. 496 (1991).

[111] 501 U.S. at 510.

[112] *Id.* at 502-08. In one instance, the article quoted Masson as saying: "I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public." *Id.* at 502. The invented words represented the reporter's rendition of Masson's assertion that the head of the Freud Archives and Freud's daughter felt that Masson "'was a private asset but a public liability.'" *Id.* at 503.

[113] *Id.* at 514.

[114] *Id.* at 517.

[115] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), discussed *supra* at text accompanying notes 64-67. The suit arose from a credit report issued by Dun & Bradstreet erroneously stating that Greenmoss had filed for bankruptcy.

[116] These were two of the inaccurate assertions about Gertz contained in the article that formed the basis of his defamation suit. Gertz v. Robert Welch, Inc., 418 U.S. 323, 326 (1974).

Finally, and somewhat paradoxically, a passage in the Court's opinion in *Gertz* has been prominently invoked as grounds for treating false factual assertion as necessary to recovery in libel. Writing for the Court, Justice Powell observed:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[118]

The paradox stems from two sources. First is the incongruity between the original significance of the passage and the magnitude of its impact on lower courts. As noted earlier, the holding of *Gertz* governs the constitutional fault requirement for private plaintiffs and the circumstances under which they may recover presumed and punitive damages.[119] Thus, Justice Powell's pronouncement on the constitutional standing of opinions and false statements of fact amounts to dictum. Still, it inspired a wide body of federal and state court doctrine premised on a constitutional distinction between privileged opinion and unprotected fact.[120] That development, in turn, led to the second paradox in the persistent significance of the *Gertz* dictum: the *Milkovich* Court's formal repudiation of an "artificial dichotomy" between fact and opinion.[121] As will be discussed, however, the Court's rejection of more expansive implications drawn from *Gertz* did not dispel the underlying principle that factual accusation lies at the core of actionable libel.[122]

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[117] The contrast between these two philosophies of constitutional constraints is typically applied to the principle of separation of powers. *See, e.g.*, William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987). However, the debate over whether to resolve constitutional issues by reference to bright-line boundaries informs free speech questions as well. Indeed, the *Milkovich* Court's rejection of a wholesale fact-opinion dichotomy, see *infra* note 125 and accompanying text, may be characterized as a functionalist position.

[118] 418 U.S. at 339-40.

[119] *See supra* notes 55-58 and accompanying text; *supra* notes 65-67 and accompanying text (discussing qualification of *Gertz* holding in *Dun & Bradstreet*).

II. *MILKOVICH*, *HEPPS*, AND THE FLAWED SUGGESTION OF RELIEF FROM THE PLAINTIFF'S BURDEN OF PROVING FALSITY

The *Milkovich* Court recited *Hepps*'s requirement that private figures prove falsity when suing media defendants for speech of public concern[123] as part of a broader explication of its holding. The Court pointed to *Hepps* and other decisions to show that "existing constitutional doctrine" adequately protects speech without drawing a categorical distinction between opinion and fact.[124] While the Court's conclusion that *Gertz* did not "create a wholesale defamation exemption for anything that might be labeled 'opinion'"[125] is unexceptionable,[126] its uncritical repetition of the limitations of *Hepps* is not. The Court's focus on one intrinsic aspect of defamation obscured its continued failure to explore the proper reach of another.

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[120] Legions of decisions prior to 1990 hinged on the assumed existence of a fact-opinion distinction. A small sampling includes: Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 685 (4th Cir. 1989); Kelly v. Schmidberger, 806 F.2d 44, 47 (2d Cir. 1986); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir. 1986); Redco Corp. v. CBS, Inc., 758 F.2d 970, 972 (3d Cir. 1985); Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984); Hallmark Builders, Inc. v. Gaylord Broad. Co., 733 F.2d 1461, 1464 (11th Cir. 1984); Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983); Clark v. Am. Broad. Cos., 684 F.2d 1208, 1217 (6th Cir. 1982); Okun v. Superior Court, 629 P.2d 1369, 1374 (Cal. 1981); Goodrich v. Waterbury Republican-Am., Inc., 448 A.2d 1317, 1321 (Conn. 1982); Haberstroh v. Crain Publ'ns, Inc., 545 N.E.2d 295, 299 (Ill. App. Ct. 1989); Henry v. Halliburton, 690 S.W.2d 775, 782-83 (Mo. 1985) (en banc); Marchiondo v. Brown, 649 P.2d 462, 468 (N.M. 1982); Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299, 1306 (N.Y. 1977); Casso v. Brand, 776 S.W.2d 551, 561 (Tex. 1989). The *Ollman* opinion, which promulgated a four-factor test for ascertaining whether a disputed statement constitutes fact or opinion, 750 F.2d at 979-84, probably exerted the greatest influence in this area. For overviews, see Eileen Finan, Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809 (1988); Leslie Kim Treiger, Note, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege*, 98 YALE L.J. 1215, 1220-26 (1989).

[121] Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990). The Court's opinion in *Milkovich* is discussed *infra* at text accompanying notes 127-45.

[122] *See infra* text accompanying notes 146-50.

[123] *Milkovich*, 497 U.S. at 16.

[124] *Id.* at 19.

A. The Significance of Hepps *in the* Milkovich *Decision*

The *Milkovich* decision culminated a protracted suit rooted in events that began fifteen years earlier. At the heart of the litigation was a sportswriter's column that appeared under the heading "Maple beat the law with the 'big lie.'"[127] The headline referred to a court's suspension of sanctions imposed by a state athletic association against Maple Heights High School for a fracas at a wrestling match between Maple and a rival.[128] Plaintiffs Milkovich, then Maple's wrestling coach, and Scott, its superintendant, had testified at the judicial hearing. Offering as the "lesson" taught by this episode that "[i]f you get in a jam, lie your way out," the column asserted that "[a]nyone who attended the meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."[129]

The impetus for the Court's disquisition on the putative fact-opinion distinction was the Ohio Supreme Court's holding that the column was "'constitutionally protected opinion.'"[130] The Court acknowledged widespread reliance on the *Gertz* dictum for the existence of a privilege for expressions of opinion.[131] Understood in context, however, the passage was seen as simply restating the longstanding First Amendment tenet that government may not act as the arbiter of truth among competing ideas.[132] In particular, the Court objected to the immunity that a blanket privilege for "opinion" would confer on expression couched in the form of opinion but implying assertions of fact.[133] The Court viewed the case before it as illustrating this fallacy. Though the language of the column could be characterized as opinion, a factfinder could reasonably "conclude that the statements in the . . . column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding."[134]

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[125] *Id.* at 18.

[126] The two dissenters indicated their agreement with the Court's correction of "any misimpression that there is a so-called opinion privilege *wholly in addition* to the protections we have already found to be guaranteed by the First Amendment," *id.* at 24 (Brennan, J., dissenting); they confined their dispute to the Court's application of the principles that it had articulated to the statements at issue in the case, *id.* at 25. *See* Edward M. Sussman, Note, Milkovich *Revisited: "Saving" the Opinion Privilege*, 41 DUKE L.J. 415, 428 (1991) (asserting that privilege for opinion as recognized prior to *Milkovich* "never created such a wholesale exemption" for opinion and that *Milkovich* therefore "removed nothing from existing doctrine by refusing to find content in the *Gertz* dictum").

[127] *See* Scott v. News-Herald, 496 N.E.2d 699, 727-28 (Ohio 1986) (quoting column in full).

[128] *See Milkovich*, 497 U.S. at 3-4.

[129] *Id.* at 4-5 (internal quotation marks omitted).

[130] *Id.* at 8 (quoting *Scott*, 496 N.E.2d at 709).

The Court's broader ruling, however, did not rest merely on disavowal of lower courts' construction of the *Gertz* pronouncement; rather, the Court declared the sufficiency of its "established safeguards" for speech.[135] "Foremost" among these, in the Court's assessment, was *Hepps*'s requirement that statements subjected to liability in defamation actions be provable as false.[136] While reiterating *Hepps*'s two qualifications, the *Milkovich* formulation appeared to entrench the public concern criterion but expressly reserved the question of defendants' media status.[137] In addition, the Court distinguished "opinions" that may imply factual assertions and those that cannot reasonably be characterized as provably false. As example, the Court contrasted two hypothetical statements. Saying "[i]n my opinion Mayor Jones is a liar" implies the speaker's knowledge that Jones told an untruth, whereas stating "[i]n my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" does not set forth a provably false proposition.[138]

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[131] *See id.* at 18 (quoting Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980)).

[132] *Id.* (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("'[T]he ultimate good desired is better reached by free trade in ideas- . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.'").

[133] *See id.* at 18-19.

[134] *Id.* at 21.

[135] *Id.* at 17.

[136] *Id.* at 19-20.

[137] *Id.* at 20 n.6.

The Court also found that a cluster of other decisions complemented *Hepps*'s protection by ensuring against inappropriate construction of language that was not meant to communicate a factual charge against the plaintiff. Having earlier canvassed its holdings in *Bresler*, *Letter Carriers*, and *Falwell*,[139] the Court extracted from these cases First Amendment protection of statements "that cannot 'reasonably [be] interpreted as stating actual facts'" about the plaintiff.[140] Without expressly restricting this protection to speech on public matters, the Court endorsed its value of assuring that "public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."[141]

The Court further noted that the intent requirements of *New York Times*, *Butts*, and *Gertz* would help to "ensure that debate on public issues remains 'uninhibited, robust, and wide-open.'"[142] Thus, even a statement of opinion implying a false defamatory fact would be shielded from liability if the libeled plaintiff could not surmount the applicable fault requirement.[143] Moreover, the requirement of independent appellate review[144] assures that courts will administer these standards in a manner so as not to "'constitute a forbidden intrusion on the field of free expression.'"[145]

In ranking *Hepps* as the "[f]oremost" source of protection in this area, the *Milkovich* Court supplanted the farrago of tests for the fact-opinion distinction with a core criterion of verifiability.[146] As a threshold matter, a court must determine as a matter of law "whether a reasonable factfinder could conclude" that the defendant's speech implies a derogatory assertion about the plaintiff.[147] If so, the court must also find as a matter of law that the proposition implied is "sufficiently factual to be susceptible of being proved true or false" before allowing consideration of the claim by a jury.[148] Commentators have differed over whether this approach substantially reduces the protection that defendants enjoyed under the opinion privilege.[149] Two decades of lower court decisions, however, suggest

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[138] *Id.* at 18-20.

[139] *Id.* at 16-17.

[140] *Id.* at 20 (quoting Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988)).

[141] *Id.* (citation omitted).

[142] *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[143] *Id.* at 20-21.

[144] *See supra* note 69 and accompanying text.

[145] *Milkovich*, 497 U.S. at 17 (quoting Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 499 (1984) (quoting *New York Times*, 376 U.S. at 285)).

[146] *Id.* at 19; *see* Martin F. Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43, 54 (1993) (stating that

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Milkovich "establishes *verifiability*—i.e., whether a statement is *capable* of verification or falsification—as the sole standard by which a court must determine whether a challenged statement on a matter of public concern not otherwise protected is entitled to First Amendment protection"); Hon. Abner J. Mikva, *In My Opinion, Those are Not Facts*, 11 GA. ST. U. L. REV. 291, 299 (1995); James F. Ponsoldt, *Challenging Defamatory Opinions as an Alternative to Media Self-Regulation*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 45, 52-53 (1998); Richard Smith, *Stealing the Good Name of the Company: The Fourth Circuit Strengthens Constitutional Barriers for Corporate Defamation Plaintiffs*, 24 J. CORP. L. 727, 731 (1999); Meiring de Villiers, *Opinionated Software*, 10 VAND. J. ENT. & TECH. L. 269, 287 (2008).

[147] *Milkovich*, 497 U.S. at 21.

[148] *Id.*; *see* Hatfill v. New York Times Co., 416 F.3d 320, 330 (4th Cir. 2005) (stating that "[t]he question whether a statement is capable of having a defamatory meaning is a question of law to be decided by the court"); Amrak Prods., Inc. v. Morton, 410 F.3d 69, 72 (1st Cir. 2005); Finebaum v. Coulter, 854 So. 2d 1120, 1128 (Ala. 2003).

[149] *Compare* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 507 (1991) (asserting that "[t]he opinion doctrine died" in *Milkovich*), *and* Wun-ee Chelsea Chen, Note, *Pinning Opinion to the First Amendment Mat*, 11 LOY. ENT. L.J. 567, 601-03 (1991) (predicting that diminution of protection would unleash "a flood of litigation"), *and* Timothy R. Hager, Note, Milkovich v. Lorain Journal Co.: *Lost Breathing Space—Supreme Court Stifles Freedom of Expression by Eliminating First Amendment Opinion Privilege*, 65 TUL. L. REV. 944, 952 (1991) (viewing *Milkovich* as inviting increased libel litigation with resultant deterrence of speech), *and* Jeanne L. Seewald, Note, *No Separate "Opinion" Privilege in Defamation Actions*, 13 U. ARK. LITTLE ROCK L.J. 517, 535 (1991) (declaring abolition of fact-opinion test), *and* Robert C. Vanderet, Jens B. Koepke & Wendy L. Bloom, *Media Law and Defamation Torts: Recent Developments*, 27 TORT & INS. L.J. 333, 340 (1992) (interpreting decisions in aftermath of *Milkovich* as showing that "[m]ost of the courts to consider *Milkovich* (including most federal courts) have concluded that *Milkovich does* significantly alter substantive law in this area"), *with* SMOLLA, *supra* note 11, at § 6:2 (stating that the Court "changed the terminology of constitutional law in *Milkovich*, but not the underlying substance"), *and* Wallis Mizell Hampton, Note, Milkovich v. Lorain Journal Co.*: The Supreme Court's Failed Attempt to Eliminate the Opinion Defense in Libel Law*, 11 REV. LITIG. 569, 570 (1992) (concluding that the Supreme Court's "current jurisprudence examines the same factors as the post-*Gertz* opinion tests"), *and* Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401, 452-53 (2004), *and* Deeann M. Taylor, Dun & Bradstreet, Hepps *and* Milkovich*: The Lin-*

that *Milkovich* altered the form more than the substance of the expression to which its qualified formulation applies.[150] Again,

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gering Confusion in Defamation Law, 1992 ANN. SURV. AM. L. 153, 195 (asserting that "despite the initial outcry, *Milkovich* does not dramatically alter the degree of protection provided statements of opinion or the analysis used to determine the scope of that protection"), *and* Nat Stern, *Defamation, Epistemology, and the Erosion (but Not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 612 (1990) (interpreting *Milkovich* as not fundamentally upsetting lower court standards), *and* Sussman, *supra* note 126, at 421 (concluding that *Milkovich* left intact First Amendment protection of "pure" opinion). A notable pre-*Milkovich* articulation of "opinion" appears consistent with the principles expounded in *Milkovich. See* Zimmerman, *supra* note 99, at 398 (positing that opinion comprises three categories of language: "[l]oose, figurative language"; the "articulation of subjective and normative judgments"; and "deductions from known data or personal observation"). For further discussion, see *infra* Part III-A.

[150] *See* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 4.2, at 4-16 through 4-23 (3d ed. 1999); Jeanine A. Graham, *Separate Right to an Opinion? The Ohio Constitution's Separate and Independent Protection for Opinions Applies to Members of the Media as Well as to Private Citizens*, 33 RUTGERS L.J. 1158, 1171-73 (2002); Pruitt, *supra* note 149, at 452-53; Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy under the First Amendment"*, 100 COLUM. L. REV. 294, 322 (2000) (stating that most courts have "reached the result that they likely would have before the Supreme Court decided" *Milkovich*); Thomas, *supra* note 99, at 395 (observing that "[t]he *Milkovich* opinion has been interpreted by most courts to continue the substance of the fact/opinion distinction with different terminology"). The continuity of lower courts' approaches with pre-*Milkovich* standards is discussed *infra* at notes 221-44 and accompanying text.

In addition, some state courts have construed state law to confer independent protection of opinion. *See, e.g.*, Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1278, 1280 (N.Y. 1991) (setting forth state standard for "separating actionable fact from protected opinion" and noting that the "'protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by' the Federal Constitution" (citation omitted)); Wampler v. Higgins, 752 N.E.2d 962, 965 (Ohio 2001) (stating that "'[r]egardless of the outcome in *Milkovich*, . . . [t]he Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press'" (quoting Vail v. Plain Dealer Publ'g Co., 649 N.E.2d 182, 185 (Ohio 1995))); *see also* Lapkoff v. Wilks, 969 F.2d 78, 81 (4th Cir. 1992) (finding statements at issue not defamatory under Virginia law and therefore not reaching the federal constitutional question); Seidl v. Greentree Mortgage Co., 30 F. Supp. 2d 1292, 1316 (D. Colo. 1998) (construing Colorado law as synthesizing *Milkovich* and existing Colorado precedent to produce framework for determining whether statement is protected); Riggs v. Clark County Sch. Dist., 19 F. Supp. 2d 1177, 1180 (D. Nev. 1998) (finding under Nevada law that "[s]eparating factual statements from opinions is a critical issue in defamation cases" (internal quotation marks and citations omitted)); Lyons v. Globe Newspaper Co., 612 N.E.2d 1158, 1165 (Mass. 1993) (stating that "the independent protections of freedom of speech which are found in our common law and in [the Massachusetts Declaration of Rights] would lead us to reach the same result even if there existed no Federal constitutional support for the principles which however, it is those qualifications—the references to speech of public concern and media defendants—that call into question whether this cabined principle collides with the larger logic of intrinsic limitations on actionable libel.

B. The Need for a Uniform Burden of Proving Falsity

In citing *Hepps* as part of the panoply of protections rendering an opinion privilege unnecessary, the *Milkovich* Court presumably incorporated that decision's reasoning as well as its holding. The *Hepps* opinion, however, did not adequately explain why it framed its ruling as applicable to speech by media defendants on matters of public concern. Indeed, the Court's reference to media defendants appears wholly gratuitous. Moreover, while the Court did address the significance that it attached to expression on public matters, it misapplied this external consideration to the intrinsic element of falsity. In so doing, the *Hepps* Court preserved an ominous suggestion from its previous term in *Dun & Bradstreet*: *viz.*, that the lesser importance of speech on private concern justifies a regime of strict liability in suits by private figures over such speech.[151] Neither individually nor together, however, do the opinions in these cases rebut the logic of a comprehensive requirement for plaintiffs to show falsity.

1. *Hepps*: Limited Revision of the Common-law Landscape

On its face, the Court's decision in *Hepps* extended First Amendment protection of defamatory speech. Plaintiff Hepps

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we applied"); Beattie v. Fleet Nat'l Bank, 746 A.2d 717, 724 (R.I. 2000) (ruling that even if statement at issue was not entitled to First Amendment protection under *Milkovich*, "our own Rhode Island Constitution affords adequate and independent grounds for us to afford 'full constitutional protection' to this type of communication" (citation omitted)). *But see* Rodriguez v. Panayiotou, 314 F.3d 979, 986-87 (9th Cir. 2002) (noting that California courts "have . . . rejected the argument that a categorical exemption for opinions, or broader protection for freedom of speech and defamation defendants than that granted by the United States Constitution, as set forth in *Milkovich*, exists independently under California law"); Beasley v. St. Mary's Hosp. of Centralia, 558 N.E.2d 677, 683 (Ill. App. Ct. 1990) (declining to construe the Illinois constitution as affording protection beyond that provided by the United States Constitution).

[151] See *infra* notes 171-75 and accompanying text.

was the principal stockholder of a corporation that franchised convenience stores.[152] The Philadelphia Inquirer ran a series of articles indicating that Hepps and others had connections to organized crime, and that they had utilized those links to influence state officials to give favorable treatment to his business.[153] Litigation in the Pennsylvania courts centered on the constitutionality of a state statute placing on the defendant the burden of proving the truth of the publication. Reversing the trial court on this point, the Pennsylvania Supreme Court upheld the statute and remanded the case for a new trial at which the defendants would bear the burden of showing that their allegations were true.[154] The Supreme Court, in turn, held that a state could not require defendants to prove the truth of their statements under the circumstances of this case. The Court's explanation of the principle established by its holding identified the pertinent circumstances: "To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."[155]

Justice O'Connor's majority opinion left ambiguous the weight accorded to the defendant's media status. Though noting that status in its holding, the Court stated—almost as an aside in a final footnote—that the case did not give occasion to consider whether suits against nonmedia defendants would be governed by the same principle.[156] Nor did the Court elaborate on why nonmedia speakers might merit less constitutional protection. At the same time, however, the opinion's pervasive use of the term "media defendant" tacitly endorses heightened solicitude for that class of speaker. This phenomenon is perhaps most striking in the way that the *Hepps* Court characterized its earlier decisions in *New York Times*, *Butts*, and *Gertz*. The holdings in these cases grew out of the status of libel plaintiffs rather than that of their libelers.[157] As recast by the *Hepps* opinion, however, *Gertz* represents the principle that "a private figure who brings a suit for defamation cannot recover without some showing that the *media defendant* was at fault in publishing the statements at issue."[158] Similarly, *New York Times* and *Butts* are distilled to embody the principle that public officials and public figures defamed on matters of public concern must "surmount a much higher barrier before recovering damages *from a media defendant* than is raised by the common law."[159] By contrast, the *Hepps* Court was far less reticent about the rationale for tying its holding to the presence of speech of public concern. For the Court, whether disputed speech addresses a public concern and the plaintiff's public or private status constitute the "two forces" determining the extent to which the First Amendment "may reshape the common-law landscape."[160] The Court therefore took both of these elements into account in formulating a principle to govern cases like the one before it: *viz.*, a private figure bringing suit over expression of public concern.[161] With status and subject matter tugging in opposite directions, the Court assessed this permutation as occupying an intermediate plane of protection. As Justice O'Connor wrote:

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[152] Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 769 (1986).

[153] *Id.*

[154] Hepps v. Philadelphia Newspapers, Inc., 485 A.2d 374, 387 (Pa. 1984), *rev'd* 475 U.S. 767 (1986). The jury had found in favor of the defendants after being instructed that the plaintiff must prove the falsity of the defamatory publication. *Id.* at 377.

[155] 475 U.S. at 776-77.

[156] *See id.* at 779 n.4.

> When the speech is of public concern but the plaintiff is a private figure . . . the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern.[162]

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[157] *See supra* notes 12-14, 35-36, 56 and accompanying text.

[158] 475 U.S. at 768 (emphasis added).

[159] *Id.* at 775 (emphasis added); *see also id.* at 773 (observing that *New York Times* standards "apply not only when a public official sues a newspaper, but also when a 'public figure' sues a magazine or news service" (citation omitted)).

[160] *Id.* at 775.

[161] *Id.* at 776; *id.* at 778 (stating that the articles about the plaintiffs "concern[] the legitimacy of the political process").

[162] *Id.* at 775.

Applying this nuanced perspective to the question of falsity, the Court acknowledged that imposing the burden of proof on either party would inevitably produce unfair results in some instances. Plaintiffs charged with proving falsity would sometimes fail to muster sufficient evidence even where speech is untrue; conversely, defendants with the burden of showing truth would be unable to meet their burden in some cases despite the fact that their speech was true.[163] Accordingly, the Court was called upon to break the tie between these competing sets of imperfect scenarios: "In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech."[164]

Pursuing its balancing exercise, the Court noted that requiring plaintiffs to demonstrate falsity "adds only marginally" to their established burden of showing fault.[165] Proof of the defendant's inadequate investigation of the published statement's truth, reasoned the Court, would typically entail evidence that the statement was false.[166] This modest incremental impact markedly contrasts with the deterrence of speech of public concern that the Court feared would result from placing the burden of proving truth on defendants.[167] In the Court's eyes, "such a 'chilling' effect would be antithetical to the First Amendment's protection of true speech on matters of public concern."[168] Thus, the "need to encourage debate on public issues"[169] proved decisive in the Court's recognition of a "constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."[170]

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[163] *Id.* at 776.

[164] *Id.*

[165] *Id.* at 778.

[166] *Id.*

[167] *Id.* at 777.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 776.

2. Doctrinal Support for the *Hepps* Qualifications: The Broader Implications of *Dun & Bradstreet*

While flawed,[171] the suggestion in *Hepps* that plaintiffs' burden of showing falsity excludes defamation by nonmedia speakers or on matters of private concern was not an entirely novel idea. As noted earlier, the Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* the previous term had exempted private figures libeled on matters of private concern from *Gertz*'s requirement that plaintiffs show actual malice to recover presumed or punitive damages.[172] The central rationale of Justice Powell's plurality opinion, however, makes plausible a wider exemption of this type of libel from ordinary First Amendment safeguards. By treating expression on private matters as less worthy of constitutional recognition than speech of public concern,[173] the plurality opinion left open the possibility that common law standards like the presumption of falsity would remain intact for this category of speech. The *Hepps* Court expressly acknowledged this possibility: "When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet,* the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape."[174] Indeed, this logic could countenance a regime of strict liability in such cases.[175]

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[171] *See infra* Part II-B-2.

[172] *See supra* note 65 and accompanying text.

[173] *See supra* notes 66-67 and accompanying text.

[174] *Hepps*, 475 U.S. at 775.

[175] *See* Joseph H. King, Jr., *Deus Ex Machina and the Unfulfilled Promise of* New York Times v. Sullivan*: Applying the* Times *for All Seasons*, 95 KY. L.J. 649, 696 (2007); Don Lewis, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers, Inc. v. Hepps, *and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 IND. L. REV. 767, 782 (1987); Patrick J. McNulty, *The* Gertz *Fault Standard and the Common Law of Defamation: An Argument for Predictability of Result and Certainty of Expectation*, 35 DRAKE L. REV. 51, 59-61 (1985); Gerald R. Smith, *Of Malice and Men: The Law of Defamation*, 27 VAL. U. L. REV. 39, 57 (1992); Smolla, *supra* note 9, at 1545-48; Taylor, *supra* note 149, at 181; Ruth Walden & Derigan Silver, *Deciphering* Dun & Bradstreet*: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?*, 14 COMM.

A distinction between media and nonmedia speakers also appears in *Dun & Bradstreet*, but more tenuously than the explicit embrace of diminished protection for libel on private matters. In the decision below, the Vermont Supreme Court had withheld the protections of *Gertz* to Dun & Bradstreet on the ground that they applied only to media defendants.[176] Because the Court's decision hinged on the private nature of Dun & Bradstreet's credit report,[177] Justice Powell's opinion did not address whether the credit agency's nonmedia status could have supplied an alternative ground for its ruling.[178] Five Justices, however, squarely rejected greater protection of media defendants under *Gertz.*[179]

3. The Discredited Notion of Media Privilege

Hepps's resurrection of a media-nonmedia distinction was surprising not simply because the idea had been slighted so recently in *Dun & Bradstreet.*[180] Though Justice Stewart famously wrote that the Free Press Clause confers distinct rights on the institutional media,[181] the Court had rebuffed arguments in favor of disparate levels of protection. In *First National Bank v. Bellotti*,[182] the Court emphatically observed that "the press does not have a monopoly on either the First

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L. & POL'Y 1, 11-13 (2009); *Developments in the Law—The Law of Cyberspace,* 112 HARV. L. REV. 1577, 1616 (1999).

[176] Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 461 A.2d 414, 418 (Vt. 1983) (cited in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 753 (1985)).

[177] 472 U.S. at 761-63. Dun & Bradstreet issued a credit report falsely reporting that Greenmoss Builders had filed for bankruptcy. *Id.* at 751.

[178] *See id.* at 784 n.10 (Brennan, J., dissenting) (observing that plurality opinion "does not expressly reject the media/nonmedia distinction, but does expressly decline to apply that distinction to resolve this case").

[179] *Id.* at 773 (White, J., concurring in judgment); *id.* at 781 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).

[180] *See* Arlen W. Langvardt, *Stopping the End-run by Public Plaintiffs:* Falwell *and the Refortification of Defamation Law's Constitutional Aspects*, 26 AM. BUS. L.J. 665, 686 (1989) (noting that the *Hepps* Court had "inexplicably raised the prospect of a media-nonmedia distinction" less than a year after a majority of Justices in *Dun & Bradstreet* had indicated rejection of a media-nonmedia distinction).

[181] *See* Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633 (1975).

[182] 435 U.S. 765 (1978).

Amendment or the ability to enlighten."[183] Even more pointedly, the Court in *Branzburg v. Hayes*[184] refused to recognize a privilege for reporters to resist a subpoena to testify before a grand jury.[185] Likewise, the Court held in *Pell v. Procunier*[186] that the media do not possess greater access to prisons or inmates than the general public.[187] Even in the realm of defamation, the Court has conferred the protection of the actual malice standard on nonmedia defendants sued by public plaintiffs.[188] Neither *Hepps* nor *Dun & Bradstreet* identifies features of defamation that might compel a departure from the Court's otherwise even treatment of media and nonmedia speakers under the First Amendment.

Nor do opinions in these cases respond to the weight of commentary condemning differential protection as impractical and unprincipled. Some observers have noted the complication and confusion that a media/nonmedia distinction would add to an already complex body of doctrine.[189] Many others have questioned the very feasibility of the distinction, echoing Justice Brennan's concern in *Dun & Bradstreet* with the "First Amendment difficulties lurk[ing] in the definitional questions" posed by special rights for media.[190] The recent proliferation of electronic modes of communication compounds this problem of identification.[191] Moreover, even assuming that the burden of proof should be linked to the public significance of speech,[192] media identity operates as a poor proxy for this element.[193]

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[183] *Id.* at 782 (invalidating state law forbidding corporations to make political contributions or otherwise assist any political campaign).

[184] 408 U.S. 665 (1972).

[185] *Id.* at 702-04; *see id.* at 705 (observing that "informative function" of organized press "is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists"); George C. Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 57 (1976) (asserting that *Branzburg* rejected special protection for media "on the only occasion when the issue has been specifically addressed").

[186] 417 U.S. 817 (1974).

[187] *Id.* at 834; *see also* Herbert v. Lando, 441 U.S. 153, 165 (1979) (stating that evidentiary rules relevant to the state of mind of a defendant in a defamation suit "are applicable to the press and to other defendants alike"). *But see* Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979) (reserving question of whether the actual malice standard can apply to a nonmedia defendant sued by a public official or public figure).

[188] *See* Linda Kalm, Note, *The Burden of Proving Truth or Falsity in Defamation: Setting a Standard for Cases Involving Nonmedia Defendants,* 62 N.Y.U. L. REV. 812, 842-43 (1987) (noting application of actual malice standard to nonmedia defendants in *New York Times* and *Garrison v. Louisiana*); *see also* St. Amant v. Thompson, 390 U.S. 727 (1968) (application of actual malice standard to defendant who was candidate for public office); Henry v. Collins, 380 U.S. 356 (1965) (application of actual malice standard in suit by private citizen who attributed his arrest to plot by public official).

[189] *See, e.g.*, Smolla, *supra* note 9, at 1564 (asserting that addition of media/nonmedia distinction would "complicate matters beyond all manageability"); Taylor, *supra* note 149, at 154 (stating that adoption of distinction would "further compli-

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cate[] the already unclear body of defamation jurisprudence"); Walden, *supra* note 175, at 12.

[190] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 782 (1985) (Brennan, J., dissenting); *see, e.g.*, Thomas D. Brooks, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461, 479 (1995) (stating that reliance on whether defendant belongs to media "would confront the Court with the slippery-slope task of defining 'the media'"); Christie, *supra* note 185, at 58 (predicting that attempt to extend enhanced protection to media under Free Press Clause "will almost certainly flounder in practice when it comes time to decide what is covered by the term 'the press'"); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 605-07 (1979); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 935 (1978) (stating that affording less First Amendment protection to nonmedia defendants "would require difficult determinations as to which communications would and would not merit the label 'press' or 'media'"); William W. Van Alstyne, Comment, *The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761, 770 (1977).

[191] *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 435 (2002) (noting that "the traditional forms [of media] are merging and dissolving into new ones, which makes that method of defining 'press' problematic"); Anne Benaroya, Note, Philadelphia Newspapers v. Hepps *Revisited: A Critical Approach to Different Standards of Protection for Media and Nonmedia Defendants in Private Plaintiff Defamation Cases*, 58 GEO. WASH. L. REV. 1268, 1298 (1990) (arguing that position in favor of giving institutional media greater constitutional protection "disregards the realities of communication in our information-based mass society"); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 905-07 (2000); Nicole A. Stafford, Comment, *Lose the Distinction: Internet Bloggers and First Amendment Protection of Libel Defendants—Citizen Journalism and the Supreme Court's Murky Jurisprudence Blur the Line Between Media and Non-Media Speakers*, 84 U. DET. MERCY L. REV. 597, 612-16 (2007); Scot Wilson, Comment, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533, 559-61 (2002).

[192] For argument against such a link, see *infra* notes 198-201 and accompanying text.

[193] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 780 (1986) (Brennan, J., concurring) (asserting that distinguishing between media and nonmedia defendants is "irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend

Traditional arguments for differential protection based on media's dissemination of information to the public,[194] already problematic, have been rendered obsolete by today's multifarious modes of communication.

Ultimately, all these critiques can be traced to the intrinsic nature of defamatory speech. The property of untruth inheres in libel irrespective of the status of the speaker. Thus, unlike the rationales in *Gertz* for variable scienter standards based on the *plaintiff's* station in society,[195] *defendant's* designation as media or nonmedia has no bearing on the alleged falsity of their statements. The inability to equate an expression's importance with its source, as well as the intractable problems of classification, underscore that the crucial feature of falsity does not vary by speaker. Accordingly, the burden of demonstrating that the statement in question falsely besmirched the plaintiff should not vary either. The Court's own cost-benefit analysis in *Hepps*—concluding that the price of penalizing some true speech exceeds the price of impunity for some falsity[196]—applies to media and nonmedia alike. Perhaps the most compelling evidence that the constant nature of factual falsity

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upon the identity of the source, whether corporation, association, union or individual'" (quoting *Dun & Bradstreet*, 472 U.S. at 781 (Brennan, J., dissenting) (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978))); Benaroya, *supra* note 191, at 1293 (arguing that according nonmedia defendants less protection would "fail to protect the speech interests of the myriad citizen-critic nonmedia commentators whose defamatory statements contribute to democratic dialogue and implicate matters of public concern"); *see* Taylor, *supra* note 149, at 171 (stating that "[b]oth media and non-media entities alike are capable of overstepping the boundaries of private concern; just as both are capable of contributing to the public debate").

[194] *See* Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 653-58 (1975); David W. Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 215-20 (1976); Stewart, *supra* note 181, at 632-37. *But see* Smolla, *supra* note 9, at 1529 (asserting that "[i]f anything, we should be stricter with media defendants" with respect to litigation of truth or falsity because "media defendants have greater capacity to cause harm by lying, and because media defendants are more likely to profit financially from lies").

[195] *See supra* notes 54-58 and accompanying text.

[196] *See* 475 U.S. at 776; Benaroya, *supra* note 191 at 1298 (describing premise of holding in *Hepps* as "rationale that erroneous findings against *all* speakers must be avoided, even at the cost of erroneous findings against private plaintiffs with meritorious suits").

calls for a uniform burden of its proof arises when a media defendant reprints a statement made by a private figure codefendant. The anomaly of differential protection that would result in this circumstance from a media-nonmedia distinction[197] highlights the clash between preference for media defendants and the centrality of falsity to libel actions.

4. The Subtle Fallacy of a Public Concern Criterion

Admittedly, a distinction between public and private concerns has a more substantial pedigree in the Court's First Amendment jurisprudence. The outcome in *Dun & Bradstreet* flowed directly from this distinction, which in turn tapped into a long-running theme of free speech doctrine.[198] Only recently the Court affirmed the extraordinary protection enjoyed by political expression under the Constitution.[199] Nevertheless, the role of subject matter in shaping the required showing of fault should not be extended to the question of falsity. It is one thing to employ a general balancing test to calibrate the level of defendants' awareness for damages in light of the type of speech involved. No such balance should be struck, however, with respect to the threshold issue of falsity. Like publication to a third party,[200] factual falsity forms part of the irreducible minimum of any successful libel action. Reversing the burden of proving its presence by requiring defendants to establish truth conflicts with basic premises of the civil litigation system.[201]

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[197] *See* Kalm, *supra* note 188, at 837.

[198] *See supra* notes 65-67 and accompanying text.

[199] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 897 (relevant passage quoted *supra* at note 29).

[200] *See* DePree v. Saunders, 588 F.3d 282, 291 (5th Cir. 2009); Gray v. AT&T Corp., 357 F.3d 763, 765-66 (8th Cir. 2004) (noting publication as element of prima facie case for defamation under Missouri law and defining publication as "communicating the defamatory matter to a third person"); London v. Sears, Roebuck & Co., 619 F. Supp. 2d 854, 864 (N.D. Cal. 2009) (noting requirement of "intentional publication" and defining requirement as "'written or oral . . . communication to some third person who understands both the defamatory meaning of the statement and its application to the person to whom reference is made'" (citation omitted)); Morris v. Harvey Cycle & Camper, Inc., 911 N.E.2d 1049, 1054 (Ill. App. Ct. 2009) (stating that plaintiff must show that defendant "made an unprivileged publication of [false statement about plaintiff] to a third party"); RESTATEMENT (SECOND) OF TORTS § 558 (1977).

Ironically, a comparison of cases in which the Court categorized the libelous statements against private plaintiffs—*Hepps*, *Dun & Bradstreet*, and *Gertz*—supports a uniform burden of proving falsity. Because *Hepps* and *Gertz* both involved matters of public concern,[202] both plaintiffs confronted the facially formidable challenge of proving a negative: Gertz's non-affiliation with a Marxist organization and non-involvement with an attack on police six years later,[203] and Hepps's lack of association with organized crime and improper exercise of influence over state officials.[204] Conversely, while it appeared fairly easy for Dun & Bradstreet to prove falsity by showing the agency's solvency,[205] exempting speech on private matters from *Hepps*'s evidentiary requirement would relieve the agency of even this minimal burden. It seems incongruous to grant leniency to a plaintiff in relatively small need of it merely because the court has placed the libel in question on the private side of a blurry divide.[206] Indeed, the Court in *Gertz* had recognized the danger of making plaintiffs' burden in libel cases contingent on a distinction so lacking in consistency. Abandoning an application of the actual malice standard based on subject matter,[207] the Court noted the difficulty occasioned by "forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."[208] Imposing on all plaintiffs the burden of showing the intrinsic element of falsity would avoid unnecessary reliance on this inevitably uncertain exercise.

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[201] Schaffer v. Weast, 546 U.S. 49, 57 (2005) (observing that "we have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims"); Burk v. Huntington Dev. & Gas Co., 58 S.E.2d 574, 581 (W. Va. 1950), *modified on other grounds*, Foster v. City of Keyser, 501 S.E.2d 165 (W. Va. 1997) (stating principle that "when a plaintiff comes into court in a civil action he must, to justify a verdict in his favor, establish his case" and that "[t]he burden of proof, meaning the duty to establish the truth of the claim . . . rests upon him from the beginning, and does not shift"); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 3:1, at 105 (3d ed. 2009) (describing as "perhaps the broadest and most accepted idea" concerning allocation of trial burdens that "the person who seeks court action should justify the request, which means [that the] plaintiffs bear the burdens on the elements in their claims"); JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 337, at 412 (5th ed. 1999) (stating that "[t]he burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion").

[202] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985) (stating that *Gertz* "involved expression on a matter of undoubted public concern").

[203] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 326 (1974).

[204] *See Hepps*, 475 U.S. at 769.

[205] 472 U.S. at 751.

[206] *See id.* at 789 (Brennan, J., dissenting) (contending that "[t]he credit reporting of Dun & Bradstreet falls within any reasonable definition of 'public concern'"); Arlen W.

The holding in *Milkovich* especially points to the inaptness of a subject matter test for plaintiffs' burden of proving factual falsity. Though *Milkovich* rejected a categorical fact-opinion dichotomy, the Court primarily invoked *Hepps* as grounds for deeming an opinion privilege unnecessary.[209] Yet, the question of whether a statement implies a false factual assertion bears no logical relation to the statement's classification as addressing a public or private concern. In *Milkovich* itself, the references to the plaintiffs' alleged lies were published in commentary on a matter of concern. If the controversy had had a less public cast, however, the analytical framework of whether the columnist had charged the plaintiffs with perjury would have

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Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241, 258 (1987) (describing standards for whether particular expression addresses a matter of public concern as the "chief question left unanswered" by *Dun & Bradstreet*); Richard J. Larson, *Defamation at the Workplace Employers Beware*, 5 HOFSTRA LAB. L.J. 45, 55 (1987) (identifying as uncertainty raised by *Dun & Bradstreet* and *Hepps* "whether an identifiable and useful test exists for distinguishing speech involving matters of public versus private concern"); *Developments in the Law—The Law of Cyberspace*, *supra* note 175, at 1619 (stating that Court's "vague instruction that courts should distinguish between public and private speech based on the speech's 'content, form, and context'" represents "open-ended inquiry" that "offers little concrete guidance, can lead to inconsistent results, and has been criticized as an ultimately unworkable standard" (citing *Dun & Bradstreet*, 472 U.S. at 761 (internal citation and quotation marks omitted))).

[207] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971) (plurality opinion of Brennan, J.).

[208] *Gertz*, 418 U.S. at 346 (citing *Rosenbloom*, 403 U.S. at 43).

[209] *See supra* notes 135-38 and accompanying text.

been identical.[210] The burden of persuasion on this interpretive issue should be identical as well.

III. PROVING DEFAMATORY FALSEHOOD IN THE POST-*MILKOVICH* ERA: TACIT DEMONSTRATION OF THE FALLACY OF BRIGHT-LINE BURDENS

Two decades of lower court decisions since *Milkovich* confirm that neither nonmedia status nor private concern should eliminate plaintiffs' burden of proving falsity. In confronting libel's intrinsic element of falsity, courts have inevitably addressed a variety of considerations that cannot be captured by rigid categories of defendants' identity and subject matter. In a sense, the *Milkovich* opinion contains seeds for eroding its suggestion that proof of factual falsehood can be cabined by these two criteria. By rejecting an "artificial dichotomy" between fact and opinion,[211] the *Milkovich* Court acknowledged that actionable libel cannot be reduced to wholesale distinctions when assessing complex realities of expression.

The fluid nature of provable falsity extends to the concept itself. The *Milkovich* opinion sets forth as separate safeguards the requisites that an actionable statement "must be provable as false"[212] and that it can "'reasonably [be] interpreted as stating actual facts' about an individual."[213] As speech is actually conducted, however, these two features frequently overlap. Indeed, a statement that cannot be regarded as "stating actual facts" about someone does not contain a provably false proposition about that person. However framed, the questions of whether a statement is susceptible to objective determination and whether it is "capable of carrying a defamatory meaning"[214] are inextricably intertwined.[215] Both are comprehended by the *Milkovich* Court's overarching "constitutional distinction between 'fact' and 'non-fact.'"[216] This analysis does not lend itself to facile compartmentalization along the lines of defendants' media designation or public importance of the disputed speech. It is unsurprising, then, that the experience of courts since *Milkovich* suggests the unsoundness of encumbering courts' inquiry into actionability with an inflexible classification scheme. Rather, the post-*Milkovich* landscape points to the wisdom of a uniform requirement that plaintiffs bear the burden of showing factual falsity.

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[210] For a discussion of considering public concern as providing context for interpretation rather than as altering the fundamental approach to disputed expression, see *infra* notes 352-58 and accompanying text.

[211] Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990).

[212] *Id.* Of course the opinion includes the qualifications regarding media defendants and public concern. *Id.* at 19-20.

[213] *Id.* at 20 (citation omitted).

[214] Jolliff v. NLRB, 513 F.3d 600, 611 (6th Cir. 2008); *see* Thomas, *supra* note 88.

A. The Persistence of Multi-factor Approaches

In denying the existence of a constitutional privilege for opinion, the *Milkovich* Court rejected multi-factor tests developed by lower courts to discern the side of the fact-opinion divide on which a statement falls. The Court's opinion specifically noted the Ohio Supreme Court's reliance[217] on the most prominent of these: the four-factor analysis of the D.C. Court of Appeals in *Ollman v. Evans*.[218] The *Ollman* approach considered whether: (1) the words as commonly used have a meaning that expresses a specific message, (2) the statement was verifiable, (3) the context in which the statement appeared colored the understanding of the statement, and (4) the "social context" in

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[215] *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993) (stating that "if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of *objectively verifiable facts*, the statement is not actionable" (emphasis added)); Cochran v. NYP Holdings, Inc., 58 F. Supp. 2d 1113, 1121 (C.D. Cal. 1998) (stating that the "standard for evaluating the threshold question" since *Milkovich* has been that "a statement may sustain a defamatory meaning only upon a showing that 'a reasonable juror could conclude that the allegedly defamatory implications constituted provably false assertions of fact'"); *see also* ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 213 (2d ed. 1994) (asserting that in the wake of *Milkovich* "[o]pinion is not protected per se by the Constitution, yet because opinion can be proved neither true nor false and a plaintiff must prove falsity to succeed, it remains nonactionable as a matter of constitutional law").

[216] Maynard v. Daily Gazette Co., 447 S.E.2d 293, 295 (W.Va. 1994) (citing RODNEY A. SMOLLA, LAW OF DEFAMATION § 6.02[1] (1994)).

[217] *Milkovich*, 497 U.S. at 9 (quoting Scott v. News-Herald, 496 N.E.2d 699, 706-07 (Ohio 1986)).

[218] 750 F.2d 970 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1127 (1985) (enbanc).

which the statement appeared transformed readers' perception of literally factual assertions.[219] Notably, this standard and similar contemporary tests[220] did not include litmus tests with respect to subject matter or the defendant's membership in the media.

Notwithstanding the Court's formal disavowal of multi-factor tests under the discredited fact-opinion distinction, however, many lower courts have continued to rely on multi-factor analyses to gauge the actionability of alleged defamatory falsehoods. To a considerable extent, their reliance echoes Justice Brennan's assertion that the considerations deemed pertinent by the *Milkovich* majority "are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion."[221] The refusal to abandon this type of scrutiny reflects a more fundamental phenomenon as well: ascertaining whether a statement communicates defamatory facts about the plaintiff is an inherently particularized exercise. Thus, examination of a number of factors in each case is an impulse that even the *Milkovich* Court could not entirely resist. A stark dichotomy between the evidentiary standards governing speech by media defendants on matters of public concern and those that apply when one of these elements is absent, therefore, philosophically if not formally clashes with the Court's denial of a bifurcation between fact and opinion. Plaintiffs of every stripe should be charged with the burden of showing that the speech about which they complain bears libel's intrinsic hallmark of provable falsity.

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[219] *See id.* at 979-84.

[220] *See, e.g.,* Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302-03 (8th Cir. 1986), *cert. denied,* 479 U.S. 883 (1986) (considering statement's specificity and precision, verifiability, social and literary context, and public context).

[221] *Milkovich*, 497 U.S. at 24 (Brennan, J., dissenting); *see also* Lisa Herskowitz, Comment, *One Bad Bit of Dictum Deserves Another:* Gertz *and* Milkovich, 24 CONN. L. REV. 1159, 1160 (1992) (contending that *Milkovich* Court's analysis of defamatory statements before it "employed the very same factors the lower courts used in the fact/opinion tests they developed in 'mistaken reliance on the *Gertz* dictum'" (quoting *Milkovich*, 497 U.S. at 19)).

The lack of analytical upheaval in the wake of *Milkovich* is especially striking in courts' insistence that previous doctrinal frameworks remain essentially unaffected by the Court's holding. The First Circuit issued a stark pronouncement of this view in *Phantom Touring, Inc. v. Affiliated Publications*.[222] After carefully reciting the *Milkovich* Court's description of existing safeguards for speech, the *Phantom Touring* court concluded that "while eschewing the fact/opinion terminology, *Milkovich* did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion."[223] A number of state courts have voiced skepticism of the impact of *Milkovich* on multi-pronged tests that had been inspired by the *Gertz* dictum. The Minnesota Court of Appeals, for example, promptly affirmed that "[t]he test used in *Milkovich* to identify protected opinions is very similar to the four-factor inquiry used by the circuit courts to distinguish fact from opinion."[224] In nearly identical language, the Nebraska Supreme Court likewise observed that the approach taken in *Milkovich* "is similar to pre-*Milkovich* cases using the fact-opinion analysis."[225] For the Colorado Supreme Court, the logic of the *Milkovich* opinion "strongly support[s] the conclusion that the factors identified" in the multi-factor test that the court had employed "remain applicable under *Milkovich*."[226] In 2000, the District of Columbia's highest court unequivocally declared that "the constitutional principles that animate" the *Ollman* court's analysis of the Op-Ed column at issue in that case "remain equally compelling and equally good law today."[227] Moreover, California courts have been notably forthright in affirming the continued relevance of the state's pre-*Milkovich* "totality of the circumstances"[228] test in the post-*Milkovich* era. Reviewing the operation of that test, one California court averred that "*Milkovich* did not substantially change these principles."[229]

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[222] 953 F.2d 724 (1st Cir. 1992).

[223] *Id.* at 727; *see also* Weinstein v. Friedman, No. 94 Civ. 6803, 1996 WL 137313, at *18 (S.D.N.Y., Mar. 26, 1996) (stating that the *Milkovich* Court "applied an analysis largely similar to that in *Ollman*").

[224] Hunt v. Univ. of Minn., 465 N.W.2d 88, 94 (Minn. Ct. App. 1991); *see also* Huyen v. Driscoll, 479 N.W.2d 76, 80 (Minn. Ct. App. 1991) (stating that "the similarity between the Supreme Court's definition of protected opinion and the circuit courts' fact/opinion analysis" mean that decisions applying the multi-factor test of Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302-03 (8th Cir. 1986), "are still instructive under *Milkovich*"). Three years after *Hunt* and *Huyen*, the Eighth Circuit cited both *Janklow* and *Milkovich* in the course of determining whether the statements in question could be regarded as assertions of false facts. *See* Beverly Hills Foodland, Inc., v. United Food & Commercial Workers Union, Local 655, 39 F.3d 191, 195-96 (8th Cir. 1994).

[225] Wheeler v. Neb. State Bar Ass'n, 508 N.W.2d 917, 921 (Neb. 1993).

[226] NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr., 879 P.2d 6, 10 (Colo. 1994) (citing Burns v. McGraw-Hill Broad. Co., 659 P.2d 1351, 1360 (Colo. 1983)).

Indeed, in spite of the *Milkovich* Court's emphatic dismissal of a First Amendment fact-opinion distinction, some courts have gone so far as to indicate that it remains substantially intact. Again, the First Circuit has been conspicuously outspoken in this area. Drawing on its earlier interpretation of *Milkovich* in *Phantom Touring*, the court in *Riley v. Harr* viewed the issue presented there as whether the challenged statements "qualify as protected opinion under" those two decisions.[230] In a similar vein, the Tenth Circuit in *Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc.* considered four factors to determine whether the challenged statement represented an "evaluative" or "deductive" opinion under *Milkovich*.[231] More bluntly, another court simply asserted that "the basic distinction between fact and opinion appears to have survived *Milkovich*."[232]

Other courts, without expressly denying the impact of *Milkovich* on previous doctrine, have conducted their view of alleged libel on the tacit premise that the Court's opinion con-

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[227] Guilford Transp. Indus., Inc. v. Wilner, 760 A.2d 580, 583 (D.C. 2000).

[228] *See* Baker v. Los Angeles Herald Examiner, 721 P.2d 87, 88-91 (Cal. 1986).

[229] Moyer v. Amador Valley Joint Union High Sch. Dist., 275 Cal. Rptr. 494, 497 (Cal. Ct. App. 1990); *see also* Franklin v. Dynamic Details, Inc., 10 Cal. Rptr. 3d 429, 436-37 (Cal. Ct. App. 2004) (stating that "[a]fter *Milkovich,* the same totality of the circumstances test is used to determine whether the statement in question communicates or implies a provably false statement of fact").

[230] 292 F.3d 282, 290 (1st Cir. 2002).

[231] 175 F.3d 848, 853 (10th Cir. 1999); *see also* Cochran v. NYP Holdings, Inc., 58 F. Supp. 2d 1113, 1121 (C.D. Cal. 1998) (noting Ninth Circuit's protection of "'[p]ure opinions'" (citation omitted)).

[232] Henry v. Nat'l Ass'n of Air Traffic Specialists, Inc., 836 F. Supp. 1204, 1215 (D. Md. 1993).

doned a multi-factor analysis. The decisions of the Ninth Circuit particularly illustrate this philosophy. The Ninth Circuit in *Unelko Corp. v. Rooney*[233] addressed whether a statement by the television commentator Andy Rooney that the plaintiff's product "didn't work" was potentially subject to liability. Stating that "we apply the analysis required by *Milkovich*,"[234] the court proceeded to examine a number of factors: the likely impression created by the language used by Rooney, the general tenor of Rooney's broadcast segment as a whole, and the susceptibility of Rooney's assertion to being proved true or false.[235] Three years later, while acknowledging that the *Milkovich* Court had "found the opinion/fact dichotomy too simplistic," the Ninth Circuit in *Partington v. Bugliosi*[236] proclaimed its adherence to "*Unelko*'s basic framework."[237] The following year, in *Underwager v. Channel 9 Australia*,[238] the court formalized this standard as an examination of the "totality of the circumstances."[239]

Nor has the Ninth Circuit been alone in seeking to preserve the essence of multifactor standards in the face of *Milkovich*'s command. The Eighth Circuit in *McClure v. American Family Mutual Insurance Co.*,[240] ostensibly applying the interpretation of Minnesota courts, displayed both sympathy for multifactor tests and its natural affinity for a required proof of falsity uncluttered by references to media status or subject matter. Observing that "[i]t is well-recognized in Minnesota that the First Amendment absolutely protects opinion that lacks 'a provably false statement of fact,'" the *McClure* court went on to apply a four-factor approach devised by the Eighth Circuit prior to *Milkovich* and still used by Minnesota courts.[241]

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[233] 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991).

[234] *Id.* at 1053.

[235] *Id.* at 1053-57.

[236] 56 F.3d 1147 (9th Cir. 1995).

[237] *Id.* at 1152-53.

[238] 69 F.3d 361 (9th Cir. 1995).

[239] *Id.* at 366; *see* Gilbrook v. City of Westminster, 177 F.3d 839, 862 (9th Cir. 1999) (confirming approach announced in *Underwager*).

[240] 223 F.3d 845 (8th Cir. 2000).

[241] *Id.* at 853 (quoting Hunter v. Hartman, 545 N.W.2d 699, 706 (Minn. Ct. App. 1996)).

The Sixth Circuit, purporting to rely on construction of *Milkovich*, has twice in recent years endorsed a four-factor system for ascertaining whether a statement amounts to actionable defamation.[242] Tellingly, while *Milkovich* singled out the *Ollman* test as a salient example of misguided doctrine,[243] belief in the test's post-*Milkovich* utility remains common. As one court explained, "the *Ollman* four-part test is 'still helpful for determining whether a statement implies actual facts that can be proven false.'"[244]

Another approach that is untethered to subject matter or defendant identity and which continues to offer guidance under the *Milkovich* regime is set forth in the Restatement (Second) of Torts § 566: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[245] This provision distinguishes between "pure" and "mixed" expressions of opinion under the First Amendment.[246] While the pure version is protected,[247] the mixed type is vulnerable because it insinuates the existence of undisclosed facts to support the defendant's derogatory opinion of the plaintiff.[248] Prior to *Milkovich*, § 566 had been routinely invoked by courts in evaluating allegedly defamatory statements defended as expressions of opinion.[249] While *Milkovich* spurned the nomenclature of opinion privilege, the Court made only oblique reference to § 566,[250] whose substance appeared to survive the holding unscathed.[251] Numerous lower courts appear to have adopted this view in their treatment of § 566 as pertinent authority.[252]

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[242] Ogle v. Hocker, 279 Fed. App'x. 391, 397 (6th Cir. 2008) (summarizing factors as "(1) The common usage or meaning of the allegedly defamatory words themselves, whether they are commonly understood to be loose, figurative, or hyperbolic words; / (2) The degree to which the statements are verifiable, whether the statement is objectively capable of proof or disproof; / (3) The immediate context in which the statement occurs; and / (4) The broader social context into which the statement fits"); Jolliff v. NLRB, 513 F.3d 600, 611 (6th Cir. 2008); *see also* Lee v. Bankers Trust Co., 166 F.3d 540, 546 (2d Cir. 1999) (applying three-factor analysis under New Jersey law but also citing *Milkovich*).

[243] *See supra* notes 217-18 and accompanying text.

[244] Martin v. Widener Univ. Sch. of Law, No. 91C-03-255, 1992 WL 153540, at *15 (Del. Super. Ct. June 4, 1992) (citation omitted); *see also* Q Int'l Courier, Inc. v. Seagraves, No. 95-1554, 1999 WL 1027034, at *6 (D.D.C. Feb. 26, 1999) (applying *Ollman* factors after asserting that "the *Milkovich* holding does not discount the four factor test established in *Ollman* for distinguishing between utterances of fact and opinion"); Henry v. Nat'l Ass'n of Air Traffic Specialists, Inc., 836 F. Supp. 1204, 1214-15 (D. Md. 1993) (applying *Ollman* test after stating that "although opinions are not absolutely privileged, the basic distinction between fact and opinion appears to have survived *Milkovich*"); Yates v. Iowa W. Racing Ass'n, 721 N.W.2d 762, 769-71 (Iowa 2006) (applying factors identified in *Ollman* in light of asserted resemblance of *Milkovich* test to pre-*Milkovich* standard drawn from *Ollman*). The similar pre-*Milkovich* test expounded by the Eighth Circuit in Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302-03 (8th Cir. 1986), see *supra* note 224, has also continued to inform courts' analysis. *See, e.g.*, McClure v. Am. Family Mut. Ins. Co., 223 F.3d 845, 853-54 (8th Cir. 2000); Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc., No. 04-4213, 2007 WL 2893374, at *3-4 (D. Minn. Sept. 28, 2007); Bruning v. Carroll Cmty. Sch. Dist., No. C04-3091-MWB, 2006 WL 1234822, at *16-17 (N.D. Iowa May 3, 2006); Yates v. Iowa W. Racing Ass'n, 721 N.W.2d 762, 769-71 (Iowa 2006).

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[245] RESTATEMENT (SECOND) OF TORTS § 566, at 170 (1977).

[246] *See id.* at § 566(b).

[247] *Id.* at § 566(c)

[248] *Id.* at § 566(b).

[249] *See, e.g.*, Baker v. Los Angeles Herald Examiner, 721 P.2d 87, 94 (Cal. 1986); Burns v. McGraw-Hill Broad. Co., 659 P.2d 1351, 1358 (Colo. 1983); Goodrich v. Waterbury Republican-Am., Inc., 448 A.2d 1317, 1324 (Conn. 1982); Fleming v. Benzaquin, 454 N.E.2d 95, 103-04 (Mass. 1983); Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299, 1306 (N.Y. 1977); Healey v. New England Newspapers, Inc., 520 A.2d 147, 150-51 (R.I. 1987); Dunlap v. Wayne, 716 P.2d 842, 848 (Wash. 1986); Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 75 (W. Va. 1981).

[250] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (noting the common law's refusal to confer fair comment privilege on "'a false statement of fact, whether it was expressly stated or implied from an expression of opinion'" (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977))).

[251] *See* Todd Love, Note, Milkovich v. Lorrain Journal Co.*: Rejection of the Constitutional Fact-Opinion Dichotomy in Defamation Law*, 36 S.D. L. REV. 764, 780 (1991) (asserting that "[t]he question asked in *Milkovich* is the same question which would be asked under the Restatement (Second) interpretation of the *Gertz* dictum").

[252] *See, e.g.*, Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman, 55 F.3d 1430, 1439 n.15 (9th Cir. 1995) (asserting that "nothing in *Milkovich* altered the constitutional principles [§ 566] articulates"); Agora, Inc. v. Axxess, Inc., 90 F. Supp. 2d 697, 704 (D. Md. 2000) (grounding analysis in both § 566 and *Milkovich*); Hopewell v. Vitullo, 701 N.E.2d 99, 103 (Ill. App. Ct. 1998); Peroutka v. Streng, 695 A.2d 1287, 1299 (Md. Ct. Spec. App. 1997) (stating that "[a]lthough the rule set out in the Restatement at first glance may seem to contradict the analysis established by the Supreme Court in *Milkovich,* upon further analysis the two can be construed to be consistent"); Beattie v. Fleet Nat'l Bank, 746 A.2d 717, 723 (R.I. 2000) (asserting that *Milkovich* "did not purport to disagree with § 566"); *see also* Milsap v. Journal/Sentinel, Inc., 100 F.3d 1265, 1268 (7th Cir. 1996) (referring to both § 566 and *Milkovich* as representing comparable principles governing implied assertions of facts).

Finally, even where courts find that *Milkovich* has supplanted their previously established multifactor test, they tend to minimize the degree of analytical revision involved. The experience of the Fourth Circuit is instructive in this regard. Prior to *Milkovich*, the court had embraced a variation of the *Ollman* test in *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*[253] Later confronted with the question of whether a magazine column about the corporate plaintiff was susceptible to suit, the court acknowledged that "it is the *Milkovich* analysis, not that of *Potomac Valve,* that we apply here."[254] Nevertheless, the court underlined the overlap between *Milkovich* and the prior Fourth Circuit standard, noting that "*Milkovich,* like *Potomac Valve,* placed 'primary emphasis . . . on verifiability of the statement' and examined the statement's language and context to determine if it could be interpreted as asserting a fact."[255] Applying its understanding of *Milkovich*, the court reached a conclusion consistent with any version of the *Ollman* test: *viz.*, that "any reasonable person" reading the column in question "would recognize, based on the tenor, language, and context of the article, that the challenged statements constitute a subjective view, not a factual statement."[256]

Courts' continued reliance on multifactor analyses, then, appears to reflect the resistance of actionability—including provable falsity—to reductionist formulas. Given the myriad forms and settings of alleged libel,[257] this avoidance of conceptual straitjackets is unsurprising. Meaning, verifiability, context: in practice, these criteria are frequently intertwined and mutually reinforcing. These considerations for assessing libel's threshold issue not only interconnect, but also transcend the frequently murky boundaries between media and nonmedia defendants and between public and private concerns. To extract and isolate the element of provable falsity, subjecting it to rigid burden-shifting rules, thus conflicts with the complex and integrated nature of this inquiry. A review of the way in which courts address these factors points to the dangers of excessive compartmentalization.

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[253] *See* 829 F.2d 1280, 1288 (4th Cir. 1987).

[254] Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998).

[255] *Id.* (quoting Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1093 (4th Cir. 1993)).

[256] *Id.* at 186.

[257] Recognition of this vast range of circumstances underlay the *Ollman* court's multifactor approach to distinguishing actionable fact from protected opinion. *See* Ollman v. Evans, 750 F.2d 970, 977-78 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985) (observing that "[b]ecause of the richness and diversity of language, as evidenced by the capacity of the same words to convey different meanings in different contexts, it is quite impossible to lay down a bright-line or mechanical distinction").

B. The Fusion of Verifiability and Meaning

The Court permitted Milkovich's suit to go forward upon finding that "the connotation that [Milkovich] committed perjury is *sufficiently factual to be susceptible of being proved true or false*."[258] As predicate for this proposition, the Court had determined that the column in question could reasonably be understood as charging Milkovich with perjury.[259] *Milkovich* itself thus exemplifies the routinely integrated nature of a disputed statement's meaning and its susceptibility to verification or falsification. Whether a statement can be proven false hinges on the content that a reasonable factfinder could ascribe to the statement[260]—an issue frequently at the heart of the dispute between the parties.[261] Accordingly, plaintiffs should not be excused from the burden of proving falsity while retaining the burden of showing defamatory meaning. To confine that burden to speech involving media defendants or matters of public concern ignores the holistic character of determining whether the speech may be subject to suit.

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[258] Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990) (emphasis added).

[259] *See id.*

[260] Eric Scott Fulcher, Note, *Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation*, 38 GA L. REV. 717, 753 (2004) (citing *Milkovich* for principle that "the key to determining whether a statement is rhetorical hyperbole is whether a reasonable person would view it as stating objective facts" (citing *Milkovich*, 497 U.S. at 20)); *see also* Pruitt, *supra* note 149, at 522 (arguing that courts should not extend automatic immunity to hyperbolic statements but rather "consider what meaning *is* being perceived by . . . reasonable persons"); *accord* Glenn J. Blumstein, *Nine Characters in Search of an Author: The Supreme Court's Approach to "Falsity" in Defamation and its Implications for Fiction*, 3 UCLA ENT. L. REV. 1 (1995); Sandra Davidson Scott, *From Satirical to Satyrical: When is a Joke Actionable?*, 13 HASTINGS COMM. & ENT. L.J. 141, 174 (1991).

[261] C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237, 283-91 (1993) (examining judicial role under *Milkovich* and *Masson* in determining whether as a threshold matter a disputed statement can reasonably be understood as conveying false, defamatory meaning).

Defamation's hybrid blend of meaning and verifiability is perhaps displayed most vividly by judicial treatment of actions for insults. Courts since *Milkovich* have generally agreed that "'[n]ame calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable.'"[262] Thus, a defendant's characterization of the plaintiff as a "bully" was held to lack sufficiently definite meaning to furnish grounds for a libel suit; since the term was "totally subjective," its application to the plaintiff was deemed not provably false.[263] Likewise, a suit based in part on the defendant's description of the plaintiff as a "moral crusader" was dismissed because that term as used in the defendant's book "cannot be objectively proven to be true or false."[264] Even a statement suggesting that the plaintiffs had been corrupted was protected where it was apparent that the defendant meant to refer to "power's tendency to make a person arbitrary, aloof, and indifferent to the effects of his actions on others."[265] The statement about corruption was therefore "not capable of objective characterization as either true or false."[266]

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[262] Hupp v. Sasser, 490 S.E.2d 880, 887 (W. Va. 1997) (per curiam) (quoting RODNEY A. SMOLLA, LAW OF DEFAMATION § 6.12[10] (1996)). As would be expected, pre-*Milkovich* courts typically adopted a similar stance. *See, e.g.,* Stevens v. Tillman. 855 F.2d 394, 402 (7th Cir. 1988) (description of plaintiff as a "racist" ruled not actionable); Buckley v. Littell, 539 F.2d 882, 894 (2d Cir. 1976) (accusation that plaintiff was a "fascist" held not subject to libel suit); Lund v. Chicago & Nw. Transp. Co., 467 N.W.2d 366, 369 (Minn. Ct. App. 1991) (dismissing suit based on reference to plaintiff as, *inter alia*, "brown nose" and "shit head[]"); Bross v. Smith, 608 N.E.2d 1175, 1177-78 (Ohio Ct. App. 1992) (protecting reference to fellow police officers as "dopers" and "rats"). *But see* Gavrilovic v. Worldwide Language Res., Inc., No. Civ. 05-38-P-H, 2005 WL 3369155, at *20-22 (D. Me. Dec. 8, 2005) (reference to plaintiff as "fuck toy" ruled actionable as capable of being understood as insinuation of sexual promiscuity).

[263] *Hupp*, 490 S.E.2d at 887.

[264] Klein v. Victor, 903 F. Supp. 1327, 1334 (E.D. Mo. 1995).

[265] Henry v. Nat'l Ass'n of Air Traffic Specialists, Inc., 836 F. Supp. 1204, 1216 (D. Md. 1993). The letter in question had quoted Lord Acton's maxim, "Power corrupts, and absolute power corrupts absolutely[.]" *Id.* at 1215.

[266] *Id.* at 1217. *But see* Tuan J. Pham v. Thang Dinh Le, No. A06-1127, 2007 WL 2363853, at *5 (finding statements that plaintiff was a "Communist lackey controlled

The oft-cited case of *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*[267] reflects the difference between verifiable fact and mere derogation, with the determination of both dependent on the meaning assigned. In an interview with a magazine writer, a store manager for Wal-Mart had described a Levinsky's store as "trashy."[268] Rejecting a libel claim over this comment, the First Circuit noted that a word can be considered defamatory under the First Amendment only if it "reasonably can be understood as having an easily ascertainable and objectively verifiable meaning."[269] The word "trashy" failed this touchstone because it "possesses a multitude of fairly ascribable meanings."[270] By contrast, a second remark that callers to Levinsky's were "sometimes put on hold for 20 minutes—or the phone is never picked up at all"[271] was ruled a valid basis of a claim. Rejecting Wal-Mart's defense that the statement should be regarded as simply an exaggeration, the court found that the reference to "20 minutes" could be understood as a literal timeframe and was therefore "sufficiently factual to be proved true or false."[272]

As *Levinsky's* illustrates, business provides a fertile setting for the interdependent relationship of statements' meaning and their verifiability. The potential financial harm from criticism gives companies and other commercial actors strong incentive to allege that they have been defamed. In these instances, the question of whether disparagement amounts to falsifiable assertion hinges on judicial interpretation of the content of the criticism. Thus, a court dismissed a claim arising from an article on the author's experience with his insurance company and claims adjuster and stating, *inter alia*, that the

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by the Vietnamese Communists" sufficiently specific to be factually proven true or false).

[267] 127 F.3d 122 (1st Cir. 1997).

[268] *Id.* at 126.

[269] *Id.* at 129.

[270] *Id.* at 130.

[271] *Id.* at 126.

[272] *Id.* at 131. The court explained that the assertion could be "verified or rebutted by objective evidence of how Levinsky's staff handled telephone calls." *Id.*

adjuster "hinted that I had stolen my own car."[273] To the court, such statements represented to readers an "expression of outrage" rather than factual assertions whose falsity could be proved.[274] Conversely, a column accusing a hospital of seeking to "rob[] the insurance company" was construed as attributing specific dishonest practices to the hospital;[275] so understood, the statement was "subject to proof of truth or falsity."[276] Similarly, a court allowed a subcontractor's suit to proceed when its employees had been charged with showing "a blatant disrespect for knowledge and craftsmanship in the sheet metal industry."[277] The court found the statement to convey enough objective content to be "factually verified" through review of the training records of the subcontractor's employees.[278]

Treatment of criticism of other professional performance also hinges on whether verifiable meaning can be divined, but here as in business situations questions of media status and public concern add little to the analysis. Attacks on a lawyer's trial strategy, for example—however they may reflect on the lawyer's competence—seem to enjoy virtually per se immunity from suit. As the Ninth Circuit put it in *Partington v. Bugliosi*, "negative statements concerning a lawyer's performance during trial, even if made explicitly, are generally not actionable since they are not ordinarily 'susceptible of being proved true or false.'"[279] In other professional contexts, suits by a doctor reported to have given "excessive" treatment,[280] an author deemed "guilty of misleading the American public" by his account of President Kennedy's assassination,[281] a basketball coach said to "usually find[] a way to screw things up,"[282] and a university graduate assistant accused of "unprofessional behavior"[283] all foundered on judicial reluctance to discern in these charges assertions that could be objectively gauged. Even a newspaper editor's ostensibly concrete declaration that the newspaper's former CEO had wrought "damage . . . [t]o our finances" was construed as too indefinite for "a reasonable person [to] go about proving or disproving."[284]

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[273] Daniels v. Metro Magazine Holding Co., 634 S.E.2d 586, 591 (N.C. Ct. App. 2006).

[274] *Id.* at 592 (quoting Horsley v. Rivera, 292 F.3d 695, 702 (11th Cir. 2002)).

[275] Florida Med. Ctr., Inc. v. New York Post Co., 568 So. 2d 454, 460 (Fla. Dist. Ct. App. 1990).

[276] *Id.*

[277] J & J Sheet Metal Works, Inc. v. Picarazzi, 793 F. Supp. 1104, 1109 (N.D.N.Y. 1992); *see also* Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204, 1206, 1212 (D.C. 1991) (permitting suit by construction project manager where project executive stated that manager "seemed detail oriented to the point of losing sight of the big picture" because statement as construed by court "could be objectively evaluated and thus verified").

[278] *Picarazzi*, 793 F. Supp. at 1109.

[279] 56 F.3d 1147, 1157 (9th Cir. 1995) (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990)); *see* Cochran v. NYP Holdings, Inc., 58 F. Supp. 2d 1113, 1124-25 (C.D. Cal. 1998) (defendant's comment that plaintiff trial attorney would "say or do just about anything to win, typically at the expense of the truth" viewed as comment on plaintiff's strategy at famous trial and therefore "is not provably true or false because

Moreover, rejection of claims that fall short of establishing verifiable content has hardly been confined to epithets and critiques of professional performance. The very range of suits defeated for failure to show a provably false assertion suggests the aptness of a universal burden of proof on this question. Language found not to lend itself to objective refutation has included matters of both official conduct and domestic care: both a description of a mayor's negotiating tactic as "legalized blackmail"[285] and an accusation that a woman "was not a fit

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there is no core of objective evidence upon which this Court could verify the allegation").

[280] Woodward v. Weiss, 932 F. Supp. 723, 726 (D.S.C. 1996) (finding that this and other statements contained in medical consultant report were "not capable of being verified as false" because "[t]here is no standard which could be used to render an objective, verifiable, factual answer" to questions about treatment raised by report). *But see* Kanaga v. Gannett Co., 687 A.2d 173, 180-81 (Del. 1996) (permitting suit based on patient's claim that physician had recommended unnecessary surgery).

[281] Lane v. Random House, Inc., 985 F. Supp. 141, 150 (D.D.C. 1995) (ruling that statement "cannot be proven true or false").

[282] Washington v. Smith, 893 F. Supp. 60, 61, 62, 64 (D.D.C. 1995) (noting that actionable statement requires speaker's claim "to be in possession of objectively verifiable facts" and finding "fatal" that plaintiff's record as coach was "open to reasonable interpretation"); *see also* Palestine Herald-Press Co. v. Zimmer, 257 S.W.3d 504, 510 (Tex. App. 2008) (dismissing suit based on statement that football coach made "obscene" gesture on field).

[283] Hupp v. Sasser, 490 S.E.2d 880, 887 (W. Va. 1997) (per curiam) (holding that descriptions were "clearly not provably false").

[284] Rose v. Hollinger Int'l, Inc., 889 N.E.2d 644, 646, 653 (Ill. App. Ct. 2008).

[285] *See* Fasi v. Gannett Co., 930 F. Supp. 1403, 1410 (D. Haw. 1995); *see also* Blevins v. W.F. Barnes Corp., 768 So. 2d 386, 391 (Ala. Civ. App. 1999) (rejecting suit

mother."[286] It spans a comment that a restaurant "denigrated" the building in which it was located[287] and a reviewer's reference to a musical-comedy production with the same name as a more popular show as "fake" and "phony."[288] Over this broad expanse of circumstances, the crucial determinant should be whether the plaintiff has shown that the disputed statement communicated a demonstrably false message—not whether certain defendants can show that it did not.

C. The Pervasive Problem of Implication

Ironically, the focus of *Milkovich* itself highlights the case for a uniform burden of proof of falsity. The Court's opinion dwelt on the phenomenon of speech that falls short of outright factual accusation but which may be perceived as implying false facts about the plaintiff.[289] With meaning so often hinging on implication, and verifiability bound up with meaning, a variable burden of proof for one of these intermingled elements makes little sense.[290] As with related aspects of defamatory content, the question of implication arises in far too many forms and settings to be straitjacketed by categories of defendant identity and subject matter. Rather, a plaintiff who seeks to recover on the ground that a statement expresses more than

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based on defendant's characterization of plaintiff paralegal's negotiating position as attempt to "extort money" from plaintiff).

[286] *See* Ireland v. Edwards, 584 N.W.2d 632, 637-38 n.8 (Mich. Ct. App. 1998) (denying that phrase as used by father's attorney outside courtroom in child custody case amounted to "an objectively provable fact").

[287] *See* 600 W. 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 936 (N.Y. 1992) (finding that term "falls far short of any requirement of verifiability").

[288] *See* Phantom Touring, Inc. v. Affiliated Publ'ns, 953 F.2d 724, 728 (1st Cir. 1992) (calling these terms "unprovable").

[289] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20-23 (1990); Blumstein, *supra* note 260, at 15 (describing *Milkovich* as "stand[ing] for the proposition that the particular language used by an author will not blind the court to implicit assertions of fact lurking within it"); Lidsky, *supra* note 191, at 926 (noting doctrines identified in *Milkovich* of provable falsity and statement of actual facts about plaintiff as "being relevant to whether a defamatory statement implies an assertion of objective fact").

[290] *See* Taylor, *supra* note 149, at 194 ("Thus, in determining the potential liability of the statements at issue, the crucial inquiry for the *Milkovich* Court was whether listeners could reasonably understand such statements to imply assertions of objective fact and, if so, whether such assertions were provable as false.").

it actually says should always be required to show that the statement had that effect.

Sometimes an alleged defamatory implication lies in the distortion that the plaintiff contends was engendered by omission of material facts.[291] Two well-known cases illustrate the prospects for success of this theory, as well as the fairness of requiring plaintiffs to bear the initial burden in such instances. In *Memphis Publishing Co. v. Nichols*,[292] a newspaper reported that a wife shot her husband and another woman after discovering them together in the woman's home. Though the account was accurate, it omitted mention of the presence of other persons in the same room during the shooting. Accordingly, the Tennessee Supreme Court found actionable defamation in the "clear implication" that the husband and woman were conducting an adulterous relationship.[293] By contrast, the plaintiff in *Mohr v. Grant*[294] failed to meet the significant burden of showing materiality imposed by the Washington Supreme Court. The suit arose from a series of televised news broadcasts about a man with Down's syndrome. In one broadcast, the man told the interviewer that Mohr had hit him and told him to "go away."[295] This report, however, did not note that Mohr and his wife had filed complaints on three previous occasions in response to the man's allegedly aggressive behavior toward them. The lower court agreed that Mohr had a cause of action grounded in the omission of facts whose context could have made the couple's conduct "appear less arbitrary and insensitive than in the story as broadcast."[296] Reversing, however, the high court took into account later newscasts reporting Mohr's version of events.[297] Thus, Mohr had failed to "[make] a prima facie showing that the communication left a false impression that would be contradicted by the inclusion of omitted facts."[298]

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[291] David M. Cohn, Comment, *The Problem of Indirect Defamation: Omission of Material Facts, Implication, and Innuendo*, 1993 U. CHI. LEGAL F. 233, 233 (stating that "[a] factually correct article may omit or falsely imply a material fact that makes the article just as harmful as a blatantly false report"); David A. Elder, *"Hostile Environment" Charges and the ABA/AALS Accreditation/Membership Imbroglio, Post-Modernism's "No Country for Old Men": Why Defamed Law Professors Should "Not go Gentle into that Good Night"*, 6 RUTGERS J.L. & PUB. POL'Y 434, 488 (2009) (proposing that in allegation against professor as homophobic or racist, "[c]ourts may and should look at the *correctness* of the facts stated, what was *omitted* and, equally importantly, whether the *assessment* of those disclosed was in error").

[292] 569 S.W.2d 412 (Tenn. 1978).

[293] *Id.* at 419. The court opined that "[t]he proper question is whether the *meaning* reasonably conveyed by the published words is defamatory, 'whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* at 420 (citation omitted).

[294] 108 P.3d 768 (Wash. 2005).

[295] *Id.* at 770.

More broadly, the very notion of defamation by implication rests on alleged inferences that reasonable readers would draw from the speech in question. Here—absent the sort of conspicuous omission found in *Nichols*—courts have generally been loath to credit the contention that defamatory falsehoods will be extrapolated from admittedly truthful statements. Thus, courts have displayed scant sympathy for suits based on defendants' construction of stated facts.[299] Even characterizations that in isolation could be thought to insinuate damning facts about the plaintiff are immune when their factual predicates are adequately disclosed. In *Biospherics, Inc. v. Forbes, Inc.*,[300] for example, the Fourth Circuit dismissed an action against the author of an article on stock tips that recommended selling Biospherics stock. The article, expressing skepticism about the company's development of a low-calorie sweetener known as "Sugaree," predicted that "'[i]nvestors will sour on Biospherics when they realize that Sugaree isn't up to the company's claims.'"[301] Rejecting the contention that readers would infer a charge of dishonesty against Biospherics, the court pointed out that the article "clearly disclosed the factual bases for its view that 'investors will sour on' Sugaree" and that each of them was uncontested.[302] Similarly, in *Locricchio v. Evening News*

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[296] Mohr v. Grant, 68 P.3d 1159, 1165 (Wash. Ct. App. 2003).

[297] 108 P.3d at 777.

[298] *Id.*

[299] David C. Vogel, Note, *You Have the Right to Criticize this Casenote: Protecting Negative Reviews Within the Law of Defamation and the First Amendment*, 60 MO. L. REV. 445, 454-55 (1995) (asserting judicial consensus that "when a statement was merely an interpretation of a set of objective facts, it could not be sued upon as defamatory"); *id.* at 455 n.105 (collecting cases).

[300] 151 F.3d 180 (4th Cir. 1998).

[301] *Id.* at 185.

[302] *Id.*

Ass'n, the developers of a resort could not persuade the Michigan Supreme Court that readers would infer from "the entire tenor" of the articles at issue that the plaintiffs were members or associates of organized crime.[303] Having failed to demonstrate inaccuracy in the facts explicitly set forth in the article, they failed to surmount the "severe constitutional hurdle"[304] they faced in meeting their burden of proving falsity by implication.[305]

Both *Biospherics* and *Locricchio* involved media defendants writing on matters of public concern; yet both of these features seem incidental to the central principle that libel plaintiffs must prove that truthful speech yields a false inference. That same principle should apply when plaintiffs' allegation of an adverse factual inference is rooted in semantic construction of a key term or phrase. If certain words lack the concrete precision from which a definite inference can be drawn, it should not matter to what topic the words were addressed or by whom. Thus, the Tenth Circuit ruled that a bond rating service's references to the "negative outlook" and "ongoing financial pressures" faced by a school district did not give rise to inferences of false assertions about the school district's financial condition.[306] Rather, in the absence of specific false assertions, the court found these phrases "too indefinite" to implicitly convey a false statement of fact.[307] A suit based in part on the defendant's account of having been spoken to "in a Gestapo voice" was similarly dismissed as the court acknowledged its inability to identify "what [the defendant] means by a 'Gestapo' voice or what such a voice would sound like."[308]

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[303] 476 N.W.2d 112, 114 (Mich. 1991).

[304] *Id.* at 129.

[305] *Id.* at 134; Chapin v. Greve, 787 F. Supp. 557, 566 (E.D. Va. 1992) (rejecting action based on newspaper article questioning efficacy of charitable project to send holiday care packages to military personnel on ground that defendant reporter "is not responsible for every defamatory implication a reader might draw from his report of true facts"); Yates v. Iowa W. Racing Ass'n, 721 N.W.2d 762, 773 (Iowa 2006) (dismissing suit for statement that termination of plaintiff racing dog kennel's booking contract was due to plaintiff's "substandard and poor" performance where "that assessment is supported by stated facts that are true"); *see also* Riley v. Harr, 292 F.3d 282, 291-92 (1st Cir. 2002) (reference to plaintiff's "lying" protected where defendant's book set forth evidentiary underpinnings to this conclusion).

[306] Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 855-56 (10th Cir. 1999).

[307] *Id.* at 856.

Of course, not every libel suit grounded in a theory of implied falsity fails to survive summary judgment. In successful actions, however, the implication of defamatory facts is sufficiently pronounced that plaintiffs typically can be said to have met an initial burden. For example, unlike diffuse charges of corruption, specific imputations of bribery are deemed actionable where they deviate from unequivocal accusation mainly in form. In *Keohane v. Stewart*,[309] the plaintiff was a judge who had presided at a trial in which a psychiatrist was found not guilty of sexually assaulting a patient by reason of impaired mental condition. Afterward, a city council member discussing the verdict remarked to a reporter: "Do you think he was paid off in cash or cocaine?"[310] Since the defendant had also asked the reporter whether the plaintiff had been "paid in drugs or money," the court had little hesitation discerning a thinly veiled assertion beneath the surface of speculative inquiry.[311] As the court noted, the defendant's questions "implied that Judge Keohane had accepted a bribe and the only unresolved issue was how Judge Keohane had been paid."[312] Similarly, a town official seeking reelection complained to the state elections commission of an opponent's campaign brochure portraying a hand holding cash under a table.[313] Barring categorical immunity for cartoons, here too the court effectively found satisfaction of the commission's burden in ruling that the cartoon "implied to the reasonable reader that Gonzalez actually accepted cash for his vote to award" the contract to which the brochure referred.[314] Nor has authorization of suits where plaintiffs have adequately shown defamation by implication been confined to speech impugning public officials. A suit against a television broadcaster for announcing that the plaintiff "may be armed and dangerous," was "most wanted," and was a "fugitive," was allowed because of the ominous implications of this language.[315] In a very different setting, individual defendants allegedly said that the plaintiff, an employee of a medical clinic, had "released confidential information about her husband . . . obtained [by her] in her employment" by the clinic.[316] There, the plaintiff had no difficulty demonstrating the alleged statement's imputation of impropriety.[317]

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[308] Daniels v. Metro Magazine Holding Co., 634 S.E.2d 586, 591 (N.C. Ct. App. 2006).

[309] 882 P.2d 1293 (Colo. 1994).

[310] *Id.* at 1302.

[311] *Id.*

[312] *Id.* at 1303.

[313] McKimm v. Ohio Elections Comm'n, 729 N.E.2d 364 (Ohio 2000).

[314] *Id.* at 372.

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[315] Hale v. City of Billings, Police Dept., 986 P.2d 413, 419-20 (Mont. 1999).

[316] Benner v. Johnson Controls, Inc., 813 S.W.2d 16, 18 (Mo. Ct. App. 1991).

[317] *See id.* at 20 (holding that statement "implies that [the plaintiff] disclosed information about [her husband's] condition which she had gained from the medical files" in the clinic).

In some instances, courts have consented to actions for implied defamation whose theory may have been somewhat less compelling. These decisions, however, can be plausibly reconciled with the principle that plaintiffs bear the burden of demonstrating that the disputed expression contains an implicit factual assertion. *See, e.g.,* Flamm v. Am. Ass'n of Univ. Women, 201 F.3d 144, 151-52 (2d Cir. 2000) (finding that report of statement by prior client of plaintiff in directory of lawyers describing plaintiff as "ambulance chaser" interested only in "slam dunk" cases "reasonably implies that he has engaged in unethical solicitation"); Riggs v. Clark County Sch. Dist., 19 F. Supp. 2d 1177, 1181, 1183 (D. Nev. 1998) (asserting that school officials, in commenting upon discharge of high school volleyball coach that "[w]hen it all comes out in the open, you parents would not want [plaintiff] as volleyball coach," had "by innuendo stated the worst"); Paint Brush Corp. v. Neu, 599 N.W.2d 384, 388 n.1, 397 (S.D. 1999) (holding that defendant manufacturer's reference to plaintiff retailer's having "lifted" its advertising copy from defendant's advertising material in a "flagrantly deceptive" manner "implies that [defendant] has knowledge of facts which lead to a conclusion that [plaintiff] is deceptive, dishonest, or some other equivalent"); *see also* Toney v. WCCO Television, Midwest Cable & Satellite, Inc., 85 F.3d 383, 388-89 (8th Cir. 1996) (permitting suit based on television broadcast on sale of stolen dogs for medical research where plaintiff alleged defamation by implication of his involvement); Weller v. Am. Broad. Cos., 283 Cal. Rptr. 644, 651 (Cal. Ct. App. 1991) (ruling that television report on origin and plaintiff's sale of antique silver candelabra to museum "could have been understood as implying that Weller had, at worst, knowingly sold stolen property to the de Young Museum and, at best, had lied about the Texas origin and had sold them at a 'grossly inflated price'"). Conversely, judicial license to a dubious claim of defamation by implication may stem more from flawed application of this concept than refusal to impose the burden of proof on the plaintiff. Barnes v. Horan, 841 So. 2d 472 (Fla. Dist. Ct. App. 2002), for example, involved a public figure suing on a matter of public concern: a candidate for state attorney asserting that he had been defamed in a political advertisement. Still, the court permitted the plaintiff to bring a claim based on the advertisement's statement (among others found actionable) that "Mr. Barnes' conduct

D. The Inevitable Consideration of Context

The intersection of verifiability, meaning, and implication is underscored by the inability to assess these elements without appreciating the context of the speech in which they are contested. The *Ollman* test regarded perspective as so important that its four factors included both context and "social context."[318] In *Milkovich*, the Court offered no explicit analysis of the relevance of context.[319] In examining the circumstances surrounding the disputed statements there, however, the Court appeared to tacitly evaluate context.[320] More broadly, the Court's opinion opposed rigid dichotomies while encouraging consultation of all information that might bear on the question of whether the speech at issue conveyed falsifiable fact.[321] Accordingly, the larger philosophy that animates *Milkovich* appears to support individualized consideration of context not dictated by rigid constraints of defendant identity or subject matter. Decisions since *Milkovich* suggest the inherent appeal of this approach, as courts have continued the pre-*Milkovich* practice of weighing context across a vast range of circumstances.

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in court has earned him somewhat unanimous disdain and contempt from most of the Monroe County Attorneys and nearly all of our judges." *Id.* at 475. According to the court, the statement "gives the impression of an insider's knowledge of undisclosed facts." *Id.* at 477.

[318] *See* Ollman v. Evans, 750 F.2d 970, 982-84 (D.C. Cir. 1984).

[319] Hansen, *supra* note 146, at 46 (arguing that the Court "failed to address how—or whether—contextual features surrounding a statement's publication necessarily affect the verifiability inquiry"); Lidsky, *supra* note 191, at 928 (asserting that the Court "failed to specify what role, if any, context plays in interpreting allegedly defamatory statements").

[320] *See* Richard Smith, Comment, *Stealing the Good Name of the Company: The Fourth Circuit Strengthens Constitutional Barriers for Corporate Defamation Plaintiffs*, 24 J. CORP. L. 727, 738 (1999) (asserting that the *Milkovich* opinion included contextual analysis).

[321] Lisa M. Montpetit, Comment, *Constitutional Law—Changes in Defamation Law for the Eighth Circuit*, 17 WM. MITCHELL L. REV. 785, 786 (1991); *see* Lisa K. West, Note, Milkovich v. Lorain Journal Co.—*Demise of the Opinion Privilege in Defamation*, 36 VILL. L. REV. 647, 682 (1991) (observing that the Court "did not intend the constitutional doctrine which it set forth to be used as a bright-line checklist for lower courts to follow, but rather intended it as a more general statement of policy considerations").

At a general level, certain modes of expression are sufficiently known as vehicles for viewpoints as to signal that some ostensibly factual assertions are not to be understood as stating unequivocal facts.[322] Readers of a sports preview magazine, for example, "understand that a considerable portion of the magazine's content is subjective opinion."[323] Likewise, the recipient of an attorney's demand letter should recognize that the letter "represents the opening salvo of what became litigation by an interested party and that the letter is that party's position, or opinion."[324] The audience for an emotional religious sermon, as well, should appreciate that at least some otherwise factual statements can be "considered as rhetorical flourishes."[325] Even accusations of criminal fraud may enjoy protection in light of their mode of delivery. Thus, charges of a company's "insider selling" and "cooking the books" lose much of their resonance when they are issued by "neutronb" on an Internet message board.[326] Conversely, an article expressing an accusatory tone toward a hospital's administration was deemed to convey defamatory facts when it was published in a newspaper column entitled "Your Business" that appeared next to other business news stories.[327]

Some genres are so clearly platforms for subjective expression as to create a powerful presumption against factual certainty if not a quasi-safe-harbor against libel suits. The meaning ascribed to statements in letters to the editor will be colored by the purpose of that forum.[328] Obviously, readers will also have different expectations of self-proclaimed columns of opinion—whether of political matters[329] or the arts[330]—than of ordinary news reports. Perhaps the best-known acknowledgement of this understanding, and its continuity with pre-*Milkovich* doctrine, occurred in *Moldea v. New York Times Co.*[331] (*Moldea II*). The plaintiff had complained that a newspaper's review of his book had contended that "there is too much sloppy journalism to trust the bulk of this book's 512 pages—including its whopping 64 pages of footnotes."[332] In originally holding the statement actionable, the D.C. Circuit had discounted the significance of its appearance in a book review in light of the ruling in *Milkovich.*[333] Upon reconsideration, however, the court admitted its earlier failure

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[322] *See Ollman*, 750 F.2d at 979 (stating that "[d]ifferent types of writing have . . . widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion").

[323] Washington v. Smith, 893 F. Supp. 60, 64 (D.D.C. 1995).

[324] Seidl v. Greentree Mortgage Co., 30 F. Supp. 2d 1292, 1316 (D. Colo. 1998).

[325] Ogle v. Hocker, 279 Fed. App'x. 391, 398 (6th Cir. 2008).

[326] *See* SPX Corp. v. Doe, 253 F. Supp. 2d 974, 977, 981 (N.D. Ohio 2003). *But see* Overstock.com, Inc. v. Gradient Analytics, Inc., 61 Cal. Rptr. 3d 29, 40 (Cal. Ct. App. 2007) (holding actionable statements in defendant's analytic reports on plaintiff company that "[w]e do not believe that [plaintiff's] accounting choice is compliant with current accounting practice" and that "we believe that the company has materially overstated its sales since July 1, 2003 and that its assertions about the economic activity of the firm are misleading" (original emphasis omitted)).

[327] Florida Med. Ctr., Inc. v. New York Post Co., 568 So. 2d 454, 459 (Fla. Dist. Ct. App. 1990); s*ee supra* notes 275-76 and accompanying text.

> to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations.[334]

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[328] *See, e.g.*, Faltas v. State Newspaper, 928 F. Supp. 637, 641, 649 (D.S.C. 1996) (dismissing suit based on assertions in letter to editor that plaintiff "offered no statistics to back up her claim and showed us how much she will lie to suit her agenda" and "present[s] lies as truth" (original emphasis omitted)).

[329] *See* Cochran v. NYP Holdings, Inc., 58 F. Supp. 2d 1113, 1123 (C.D. Cal. 1998); *see also* Fasi v. Gannett Co., 930 F. Supp. 1403, 1409-10 (D. Haw. 1995) (noting that reference to mayor's "legalized blackmail" on editorial page was "a forum where readers anticipate subjective views").

[330] *See* Phantom Touring, Inc. v. Affiliated Publ'ns, 953 F.2d 724, 729 (1st Cir. 1992) (observing that theater column is "a type of article generally known to contain more opinionated writing than the typical news report").

[331] 22 F.3d 310 (D.C. Cir. 1994).

[332] *Id.* at 312.

[333] *See* Moldea v. New York Times Co., 15 F.3d 1137, 1145-46 (D.C. Cir. 1994) ("*Moldea I*").

[334] *Moldea II*, 22 F.3d at 311; *see* John Hershey, Note, *If You Can't Say Something Nice, Can You Say Anything at All?* Moldea v. New York Times Co. *and the Importance of Context in First Amendment Law*, 67 U. COLO. L. REV. 705, 716 (1996) (describing *Moldea II* as holding that "expressions of subjective evaluation, especially in contexts like book reviews, are just as immune from libel suits after *Milkovich* as they were before").

Other genres may entail different considerations, but still share these forms' fundamental trait of presenting a context for interpretation that courts should not ignore. In the case of works of fiction, a plaintiff may claim that what purports to be an imagined tale effectively amounts to "thinly disguised character assassination."[335] Commentators offer various approaches to the weight to be assigned the fiction label.[336] Still, it would be startling for a court to full equate the treatment of a work denominated as fiction with its analysis of conventional journalistic reports. Similarly, though docudramas generally present themselves as more grounded in reality, the Court itself has recognized that viewers will not necessarily assume that words spoken by persons represented in these programs were actually uttered by them in life.[337]

In some instances, it is not so much the nature of the genre as the particular vehicle of speech that furnishes the pertinent context. The *Milkovich* Court looked to the "general tenor" of the disputed article to determine whether the assertion that Milkovich "lied at the hearing" could reasonably be understood to convey a factual charge of perjury.[338] In similar fashion, courts have scrutinized the communication in which the allegedly libelous statement appears for the manner in which it conditions readers' expectations. Thus, what might otherwise be perceived as accusation of financial impropriety against a departing corporate officer assumes less sinister overtones in the context of a "mean-spirited sendoff" of the officer.[339] In a comparable analysis, statements critical of a corporation were found not to project defamatory facts when appearing in an article with a "breezy rather than solemn tone."[340] By contrast, an attorney representing accused criminals was allowed to sue over a book's portrayal of him in view of the "context of the book as a whole."[341] That context—narrating numerous episodes of corruption in the Chicago area, including within the judicial system—imparted an "allu[sion] to bribery and corruption of the judicial system"—to what in other contexts could have been seen as a tribute to the plaintiff's legal skills.[342] Where judges themselves are impugned, however, context may transform the meaning conveyed to a more subjective sense. Thus, suits failed where a judge's description as "dishonest" formed part of a "string of colorful adjectives" used by the defendant to express his scorn,[343] and where an arguable insinuation of a judge's bribery was contained in a letter "replete with speculative and conjectural language."[344] Elsewhere, too, specific context is routinely invoked to resolve ambiguity in favor of either factual implications[345] or their absence.[346]

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[335] Blumstein, *supra* note 260, at 31; *see, e.g.*, Bryson v. News Am. Publ'ns, Inc., 672 N.E.2d 1207, 1218 (Ill. 1996) (permitting suit arising from story in magazine's fiction section in which plaintiff is identified by name as "slut"). *See generally* Mark Arnot, Note, *When is Fiction Just Fiction? Applying Heightened Threshold Tests to Defamation in Fiction*, 76 FORDHAM L. REV. 1853 (2007).

[336] *See, e.g.*, Arnot, *supra* note 335, at 1901 (arguing that "a clear disclaimer" that a work is fiction "should create a presumption that [the] work does not reasonably state actual facts"); Blumstein, *supra* note 260, at 31-32 (arguing for weight to be given to a disclaimer because "[t]he label 'fiction' still proclaims that the author eschews any obligation to descriptive truth"); Frederick Schauer, *Liars, Novelists, and the Law of Defamation*, 51 BROOK. L. REV. 233, 244 (1985) (asserting that "the cases show us authors caught in their thinly veiled personal attacks that lack factual bases or authors who plainly use recognizable real models for their fictional characters" (footnotes omitted)); Daniel Smirlock, Note, "*Clear and Convincing" Libel: Fiction and the Law of Defamation*, 92 YALE L.J. 520, 538-42 (1983) (advocating test base on unmistakability, specificity, and believability of reference to plaintiff); *cf.* Dienes & Levine, *supra* note 261, at 316-17 (indicating that disclaimers should be considered but not dispositive in determining whether publication can reasonably bear false, defamatory meaning).

[337] Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 512-13 (1991); *see* Partington v. Bugliosi, 56 F.3d 1147, 1155 (9th Cir. 1995) (stating belief that views of docudrama at issue "would be sufficiently familiar with this genre to avoid assuming that all statements within them represent assertions of verifiable facts"); Daphne Barak-Erez, *The Law of Historical Films: In the Aftermath of* Jenin, Jenin, 16 S. CAL. INTERDISC. L.J. 495, 500-01 (2007); Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-based Dramas—What Every Producer's Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 483, 491-95 (1992).

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[338] Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990).

[339] Rose v. Hollinger Int'l, Inc., 889 N.E.2d 644, 653-54 (Ill. App. Ct. 2008) (dismissing suit based on statement that officer had "wrought damage to our finances"); *see also* Morningstar, Inc. v. Superior Court, 29 Cal. Rptr. 2d 547, 553 (Cal. Ct. App. 1994) (dismissing action based on article in financial newsletter entitled "Lies, Damn Lies, and Fund Advertisements" where "[t]he imaginative title and its hint of upcoming criticism of statistics was not likely lost on the readers of petitioners' commentary—the relatively sophisticated subscribers to the financial newsletter" (inner quotation marks and citation omitted)).

[340] Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998); *see supra* note 256 and accompanying text.

[341] Tuite v. Corbitt, 866 N.E.2d 114, 128 (Ill. 2006).

[342] *See id.* at 127-29. The book reported as the defendants' reaction to the plaintiff's retention in their criminal case that they believed that the plaintiff "had it all handled," and "it was like it was a done deal, like they were all going to be acquitted." *Id.* at 128.

The setting in which alleged defamation takes place may also figure prominently in the Court's consideration of context. A conspicuous example is defamation actions that arise out of employment relationships.[347] While claims of workplace defamation do not lend themselves to blanket treatment under *Milkovich*,[348] courts have frequently taken employment conditions into account in determining whether disputed expression amounts to defamatory falsehood.[349] In many instances, dismissal of actions reflects an appreciation of the heated rhetoric often generated by collective bargaining issues and other labor matters.[350] Though of course courts do not reject every claim originating in an employment context, even a successful plaintiff is likely to proceed because of countervailing contextual considerations.[351]

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[343] Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995).

[344] *See* Keohane v. Stewart, 882 P.2d 1293, 1302 (Colo. 1994).

[345] *See, e.g.*, Weller v. Am. Broad. Cos., 283 Cal. Rptr. 644, 652 (Cal. Ct. App. 1991) (implication in television report of plaintiff's dishonest conduct in connection with sale of candelabra to museum supported by "background of apparently objective and neutral reporting").

[346] *See, e.g.*, Bennett v. Hendrix, 325 Fed. App'x. 727, 742 (11th Cir. 2009) (determining under "context-driven inquiry" that juxtaposition in campaign brochure of plaintiff's mug shot and phrase "convicted criminals" constituted unprotected false factual assertion); Ireland v. Edwards, 584 N.W.2d 632, 638 (Mich. Ct. App. 1998) (disparaging assertions about plaintiff's conduct as mother "read or heard in context, could not reasonably be understood as stating actual facts" about plaintiff).

[347] *See generally* John Bruce Lewis & Gregory V. Mersol, *Opinion and Rhetorical Hyperbole in Workplace Defamation Actions: The Continuing Quest for Meaningful Standards,* 52 DEPAUL L. REV. 19 (2002).

[348] *See id.* at 21 (concluding that "while the *Milkovich* decision has done little harm, it has failed to provide clear, workable tests for identifying statements of opinion or rhetorical hyperbole in the workplace").

[349] For the Court's pre-*Milkovich* recognition of this phenomenon, see Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974) (noting that "exaggerated rhetoric" is "commonplace in labor disputes").

[350] *See, e.g.*, McClure v. Am. Family Mut. Ins. Co., 223 F.3d 845, 851 (8th Cir. 2000) (holding that statements about terminated agents that had engaged in "disruptive and disloyal activity over a period of years" and conduct that was "totally unacceptable by any business standard" were protected); Henry v. Nat'l Ass'n of Air Traffic Specialists, Inc., 836 F. Supp. 1204 (D. Md. 1993); Dubinsky v. United Airlines Master Executive

The countless ways in which context shapes meaning not only counsels against a rigidly compartmentalized burden of proof, but also illuminates a proper role for the subject matter of alleged libel. A public concern, rather than dictating who must show provable falsity, should simply represent a significant context for interpreting the language in question. The Court implicitly recognized this dynamic as long ago as *Greenbelt*, observing that the reference to the plaintiff's "blackmail" occurred in the course of "public debates . . . [that] were heated, as debates about controversial issues usually are."[352] Prior to *Milkovich*, courts had identified the context of public debate as a relevant factor in fixing reasonable meaning,[353] and commentators since have urged continued consideration of this circumstance.[354] Post-*Milkovich* courts appear to have followed suit. In ruling that statements in an organization's letter opposing a proposed neighborhood development did not constitute libel, a court—explicitly invoking *Milkovich*—pointed out that the letter "addresses issues that were at the center of a heated debate," and that "[i]n this type of public debate, an audience expects opposing sides to use persuasive force to convince others to adopt their position and is less likely to perceive statements as objective assertions of truth."[355] A plaintiff charged

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Council, 708 N.E.2d 441 (Ill. App. Ct. 1999); Huyen v. Driscoll, 479 N.W.2d 76 (Minn. Ct. App. 1991).

[351] *See, e.g.*, Jolliff v. NLRB, 513 F.3d 600, 613 (6th Cir. 2008) (noting that allegedly defamatory statement was made in context of letter seeking to "communicate the employees' specific concerns").

[352] Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 13 (1970).

[353] *See, e.g.*, McCabe v. Rattiner, 814 F.2d 839, 843 (1st Cir. 1987) (noting that "[i]n the context of public debate over a matter of community concern," articles like that involved in this case would be "commonly understood to be attempts to influence that public debate"); Southern Air Transp., Inc. v. Am. Broad. Cos., 877 F.2d 1010, 1016 (D.C. Cir. 1989) (taking into account context of "political controversy" in finding nominally factual statement to constitute protected expression of opinion).

[354] *See, e.g.*, Fulcher, *supra* note 260, at 764.

[355] Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org., Inc., 694 N.W.2d 92, 96-97 (Minn. Ct. App. 2005).

with "illegal" behavior at a public hearing on its building permit application was likewise met with the court's observation that the defendant had not spoken as "someone inviting reasonable persons at a heated public hearing to find specific factual allegations in his remarks."[356] When a conservative political leader brought suit over his asserted "paranoia," the court cited the description's presence in an article of "political commentary" in finding that the term was used in "a popular, not clinical" sense.[357] In numerous other instances as well, the presence of a public concern has apparently colored judicial perception that the disputed statement should not be construed as a defamatory factual assertion.[358]

CONCLUSION

The Supreme Court should dispel the lingering possibility left by *Milkovich* and *Hepps* that libel defendants' nonmedia status or speech on private concerns relieves plaintiffs of their burden of proving falsity. Neither feature is germane to the inherent character of defamation, and should therefore have no bearing on plaintiffs' threshold burden of proof. The notion of a privileged position for institutional media is not only far removed from considerations informing the determination of actionability in libel suits, but also contradicts the Court's own pronouncements. By contrast, a preferred position for defamatory expression on matters of public concern has figured prominently in the Court's jurisprudence. The weight accorded to public concern, however, has arisen in the course of categorical balancing pertaining to questions of intent rather than to the intrinsic nature of the disputed speech. Developments in the lower courts since *Milkovich* suggest the appropriateness of a uniform requirement that plaintiffs show falsity without regard to who defendants are or how their speech is labeled.

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[356] 600 W. 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 937 (N.Y. 1992); *see also* Pullum v. Johnson, 647 So. 2d 254, 258 (Fla. Dist. Ct. App. 1994) (dismissing suit based on reference to plaintiff advocate of changes in local ordinances as "drug pusher" and noting "frequent use of ill-considered, name-calling attacks in American political debate").

[357] Weyrich v. New Republic, Inc., 235 F.3d 617, 620 (D.C. Cir. 2001); *see also* Kevorkian v. Am. Med. Ass'n, 602 N.W.2d 233, 239 (Mich. Ct. App. 1999) (dismissing suit by leading advocate of assisted suicide for reference to him as "a killer" and noting that statements that included reference involved obvious matter of public concern in finding that they were "necessarily subjective and could also be reasonably understood as not stating actual facts").

[358] *See, e.g.*, CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 301-02 (4th Cir. 2008) (ruling that reference to plaintiff government contractor providing support to Army intelligence brigade at Abu Ghraib prison as "hired killers" was protected because statements that included reference "'make[] clear to all reasonable listeners that [they] are offered . . . not as fact[s],' but as exaggerated rhetoric intended to spark the debate about the wisdom of the use of contractors in Iraq" (citation omitted)); Cochran v. NYP Holdings, Inc., 58 F. Supp. 2d 1113, 1122-24 (C.D. Cal. 1998) (protecting statement that plaintiff criminal defense attorney would "say or do just about anything to win, typically at the expense of the truth" while noting that the O.J. Simpson criminal trial, in which plaintiff served as Simpson's attorney, "has been thoroughly critiqued and debated in the public arena"); Chapin v. Greve, 787 F. Supp. 557, 561 (E.D. Va. 1992); Fasi v. Gannett Co., 930 F. Supp. 1403, 1409-10 (D. Haw. 1995); Maynard v. Daily Gazette Co., 447 S.E.2d 293 (W. Va. 1994).

FEDERALISM'S FLOOR

Gerald G. Ashdown[*]

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INTRODUCTION

Much has been said about the United States Supreme Court's federalism revolution—its purpose, effect, wisdom, and whether or when it ceased.[1] The Court's forays at the end of the twentieth and beginning of the twenty-first centuries into federal-state relations took many forms, included in which were limits placed on the reach of the Commerce Clause,[2] the state sovereign immunity decisions,[3] restrictions on congressional power under Section 5 of the Fourteenth Amendment,[4] and the Court's anti-commandeering cases.[5] Regardless of where one stands in the federalism debate, the overall impact of these cases on the federal-state balance has been markedly small, and for good reason, which I hope to show.

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[1] *See* Erwin Chemerinsky, *Federalism Cases in the October 2004 Term*, 21 TOURO L. REV. 787 (2006) (discussing whether the Supreme Court had paused or reversed course in its pro-states' rights conception of federalism); Neal Devins, *How Congress Paved the Way for the Rehnquist Court's Federalism Revival: Lessons from the Federal Partial Birth Abortion Ban*, 21 ST. JOHN'S J. LEGAL COMMENT. 461 (2007) (discussing how the federal partial-birth abortion ban tested the Supreme Court's limits on the use of Commerce Clause authority); Seth P. Waxman, Foreword, *Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115 (2001) (discussing his role as Solicitor General during the Clinton Administration, when the Supreme Court rendered the bulk of its recent pro-states' rights federalism decisions).

Nonetheless, the debate that began in the summer of 1787, and which has raged recently, at least since Herbert Wechsler's influential article in the Columbia Law Review in 1954,[6] is not without high stakes—at least theoretically. Although federalism is an oft-misused term (it refers to the federal-state balance and not necessarily to a policy favoring state government), shifting authority between federal and state government matters. It moves power to a different set of policy and decision makers. Looking back to the late eighteenth century, the founders believed simply that strong state governments would parry potential federal tyranny. It is now argued that shifting power to the states permits responsiveness to and satisfaction of diverse local preferences (along with local political participation and responsibility), and encourages experimentation and interstate competition[7] (which could be either positive or nega-

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[2] *See* Gonzales v. Raich, 545 U.S. 1 (2005); Granholm v. Heald, 544 U.S. 460 (2005); Pierce County v. Guillen, 537 U.S. 129 (2003); Jones v. United States, 529 U.S. 848 (2000); United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[3] *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[4] *See* United States v. Georgia, 546 U.S. 151 (2006); Tennessee v. Lane, 541 U.S. 509 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

[5] *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

[6] Herbert Wechsler, *Political Safeguards of Federalism: The Role of the States in the Compositions and Selection of National Government*, 54 COLUM. L. REV. 543 (1954).

[7] John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 106-12 (2004).

> To the extent that local majorities in different states have divergent preferences from each other, a federal system can ensure a higher degree of citizen

tive—a "race to the top" or a "race to the bottom"). It also could signal an ideological swing to a more conservative agenda since states are less likely to regulate to protect interests like those of the poor, consumers, and the environment.[8] At bottom, favoring states in the federal balance protects the rights of geographic groups with all the advantages and disadvantages which flow from such an allocation. The question is not only what is the proper allocation of power between the federal and state governments, but who can and should regulate the alignment. This is where the Supreme Court's recent federalism decisions enter the picture and where the current debate over the judiciary's role begins.

Herbert Wechsler, in the article previously referenced, argued that the constitutional design of the national government will inherently protect local interests; that the states will not look out for the interests of the national government, and thus it should be the Supreme Court's role to police state encroach-

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> satisfaction than a unitary polity. If, for example, some state-level majorities prefer a policy of high taxes and high levels of government services while others prefer low taxes and low service levels, they can each be accommodated by their respective state governments. A unitary government with a one-size-fits-all policy will, by contrast, likely leave a larger proportion of the population dissatisfied with the resulting mix of policies. Federalism's accommodation of diverse preferences can ease racial, ethnic, religious, and ideological conflicts by allowing each of the opposing groups to control policy in its own region.

Id. at 106.

> Diversity, vertical competition, and horizontal competition may all be undermined by various principal-agent problems in federalism's political process. Both state and federal elected officials may be tempted to undermine them in order to advance their electoral and other interests. Thus, judicial restraint of federal government power will sometimes be necessary in order to ensure that the benefits of federalism are not lost.

Id. at 111.

[8] M. Elizabeth Magill, *The Revolution that Wasn't*, 99 NW. U. L. REV. 47, 73-74 (2004). McGill notes that many political conservatives are fans of federalism because state governments are less likely to redistribute wealth given the competition that exists between jurisdictions to attract businesses and residents. *Id.* at 73. She also argues that states will approach problems differently than the federal government because state governments are structured very differently than the national government, with many states electing judges, providing line-item veto authority to the Governor, and allowing the public to enact policy change through referendums. *Id.* at 74.

ment on national authority.[9] More recently, Larry Kramer has questioned Wechsler's political safeguards theory. He reasons that although federal lawmakers come from the states, federal law is made by majority coalitions from different regions and thus some regions may lose out.[10] He nevertheless feels that the development of strong political parties and the function of the administrative process, both of which must operate for effectiveness through all levels of government, protect local interests, and hence the states do not need the help of the judiciary.[11]

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[9] Wechsler, *supra* note 6, at 559 ("The prime function envisaged for judicial review—in relation to federalism—was the maintainance [sic] of national supremacy against nullification or usurpation by the individual states, the national government having no part in their composition or their councils. This is made clear by the fact that reliance on the courts was substituted, apparently on Jefferson's suggestion, for the earlier proposal to give Congress a veto of state enactments deemed to trespass on the national domain. And except for the brief interlude that ended with the crisis of the thirties, it is mainly in the realm of such policing of the states that the Supreme Court has in fact participated in determining the balances of federalism.") (footnotes omitted). *See also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 176-81 (1980).

[10] Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000) ("Preferences in Congress are aggregated on a nationwide basis: However sensitive federal legislators may be to state or local interests, if interests in an area represented by a majority of these legislators concur, interests in the rest of the country will be subordinated. The whole point of federalism (or at least the best reason to care about it) is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking.").

[11] *Id.* at 268-87. Kramer wrote in 2000. The past nine years have provided examples of regionalization within both major political parties. When George W. Bush defeated both Al Gore and John Kerry in Presidential elections, the Democratic Party was criticized by some as becoming a regional, as opposed to national, party because the party's electoral success was concentrated in the Northeast, Upper Midwest, and West Coast. *See generally* ZELL MILLER, A NATIONAL PARTY NO MORE: THE CONSCIENCE OF A CONSERVATIVE DEMOCRAT (2003). Similarly, over the last two elections Republicans have been criticized for becoming a southern party. Kathleen Parker, *A Tip for the GOP: Look Away*, WASH. POST, Aug. 5, 2009, at A13. Through the election of both a Republican and Democratic President and Republican and Democratic majorities in Congress, the bulk of the electoral landscape has remained the same, with Democrats dominating the Northeast, Upper Midwest, and West Coast, and Republicans maintaining large majorities in the South. Regionalization of the two parties makes it difficult to rely on the political process to protect federalism because, as one party has power, certain parts of the country will maintain the levers of power at the federal level while the others will be subordinate.

One thing, however, seems apparent. The political process has a built-in incentive to largely ignore second-order structural issues like federalism. Interest groups and their constituents focus on first-order issues of immediate interest to them like abortion, gay marriage, gun control, and the environment. It is these substantive issues that dominate over structural issues like federalism; thus the national political process is unable to effectively police the federal-state balance. Supporters of priority issues are willing to use whatever level of government furthers their agenda and are sometimes quite inconsistent on federalism in pursuit of their goals.[12] For example, in the case of the Federal Partial-Birth Abortion Ban Act of 2003, the pro-choice side who generally favors federal power, e.g., the Freedom on Access to Clinics Act, was reluctant to attack partial-birth abortion on Commerce Clause grounds.[13] Conversely, opponents of gay marriage, who generally align with states' rights, were more than happy to have Congress pass the Defense of Marriage Act,[14] while those favoring gay rights are more than willing to have the state legislatures or state courts do their bidding. Favoring the federal position is not necessarily liberal,[15] and vice versa. It is whatever level of government works for one's policies that counts.

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[12] Neal Devins, *How Congress Paved the Way for the Rehnquist Court's Federalism Revival: Lessons from the Federal Partial Birth Abortion Ban*, 21 ST. JOHN'S J. LEGAL COMMENT 461, 462-69 (2007). Conservatives traditionally have a more restrictive view of federal authority under the Commerce Clause. The more conservative Justices on the Supreme Court made up the majorities in Morrison and Lopez. However, conservatives also tend to favor more restrictions on abortion. It was a Republican Congress and a Republican President who exercised federal authority to ban the late-term abortion procedure commonly referred to as partial-birth abortion. If Congress lacks the authority to regulate domestic violence under the Commerce Clause (under the *Morrison* decision) and may only regulate guns when there is a clear showing the gun was involved in interstate commerce (under *Lopez*), how can Congress regulate abortion? The answer seems to be that liberals did not ask the Supreme Court to strike down the Partial-Birth Abortion Ban for exceeding the Commerce Clause. *See* Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it."). It is likely that liberals who wanted to preserve a strong Commerce Clause for future exercises of federal authority did not want to push the Supreme Court toward an opinion which could limit the scope of the commerce power. In so doing, however, they gave up perhaps their best opportunity to gain a fifth vote for striking down the partial-birth abortion ban. At worst, making the argument would have forced the more conservative Justices to choose between the abortion ban and federalism positions.

[13] *See* Devins, *supra* note 12, at 470. *See infra* notes 94-98 and accompanying text.

[14] 1 U.S.C. § 7 (2005), 28 U.S.C. § 1738C (2006).

Thus the debate still swirls around where structural control lies or should be placed. Even if Wechler's structural political safeguards argument and Kramer's critique and more modern pragmatic political safeguards response are rejected in favor of judicial intervention to protect the states, there seems to be a kind of judicial leveling phenomenon that has taken place during the past few years. This leveling, which, I think, is due to a combination of factors, appears to have created a floor beyond which the judiciary is unable or unwilling to intervene. Whether the Rehnquist Court rejected the Wechler and Kramer arguments or was simply off on a states' rights lark of its own, the movement seems to have bottomed out,[16] or reached a floor on limiting the reach of federal power.[17] This phenomenon has arisen from several factors—natural limits on the Court's recent Commerce Clause, sovereign immunity, and Section 5 decisions; congressional use of the Spending Clause; and politics both outside and inside the Court. All will be explored in turn.

I. THE COMMERCE CLAUSE

As everyone familiar with the issue knows, in *United States v. Lopez*,[18] invaliding the Federal Gun-free School Zones Act, and *United States v. Morrison*,[19] invalidating the civil provisions of the Violence Against Women Act, the Supreme Court attempted to restrict congressional power under the Commerce Clause. In *Lopez,* Chief Justice Rehnquist's majority opinion held that there were three broad categories where Congress could regulate under its commerce power—the channels of interstate commerce, the instrumentalities of interstate commerce, and commercial or economic activity that substantially affects interstate commerce. Neither guns in school zones nor violence against women were included in the latter category because neither were economic in nature.

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[15] See also *Gonzales v. Raich*, 545 U.S. 1 (2005), in this regard as well as the federal position in *Gonzales v. Oregon*, 546 U.S. 243 (2006).

[16] *See* Chemerinsky, *supra* note 1, at 799 ("For the last few Terms every federalism case argued before the Supreme Court has been decided against the state's [sic] rights position and in favor of federal power.").

[17] The limits effected on any judicial attempt to shift power to the states can either be viewed as a ceiling or a floor. If viewed from the perspective of the states it would more accurately be characterized as a ceiling, whereas if looked at from the federal perspective, it should be seen as a floor above which federal power remains.

[18] 514 U.S. 549 (1995).

[19] 529 U.S. 598 (2000).

Although heralded as the Court's first restrictions on the commerce power since 1937, these decisions proved to be quite limited. First, Congress simply amended the Gun-free School Zones statute to require a jurisdictional element—that the gun involved traveled in interstate commerce[20]—which the Court in *Lopez* noted was lacking. Since virtually all guns move in interstate commerce, not much was lost except requiring the U.S. Attorneys' office to prove this element. Another example of the effectiveness of the channels or instrumentalities approach lies in *Pierce County, Washington v. Guillen.*[21] In *Guillen*, the Washington Supreme Court had invalidated as beyond the commerce power part of the Federal Hazard Elimination Program, which allowed states to keep information they had compiled or collected about hazardous conditions on public roads confidential.[22] Reversing this determination, Justice Thomas wrote for a unanimous Court that this provision clearly fell within congressional power to regulate the channels and instrumentalities of interstate commerce.[23] Thus, even within the seemingly limiting framework of *Lopez* and *Morrison*, Congress has broad power to legislate. There is simply no way for the judiciary to limit the power of Congress to reach the channels and instrumentalities of interstate commerce, even if the activity is not economic, which as we saw in *Guillen*, automobile travel may not always be.

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[20] *See* 18 U.S.C. § 922(q) (2000) (as amended effective September 30, 1996); Congress also added findings that guns, ammunition, and even criminals themselves readily move in interstate commerce and violence in and around schools reduced the quality of education, further harming interstate commerce. H.R. REP. NO. 104-H11743, TIT. I, SEC. 657(A)-(E) (1996).

[21] 537 U.S. 129 (2003).

[22] *Id.* at 147-48.

[23] *Id.* at 147 ("Congress adopted § 152 to assist state and local governments in reducing hazardous conditions in the Nation's channels of commerce. That effort was impeded, however, by the States' reluctance to comply fully with the requirements of § 152, as such compliance would make state and local governments easier targets for negligence actions by providing would-be plaintiffs a centralized location from which they could obtain much of the evidence necessary for such actions. In view of these

The inability of placing meaningful judicial restrictions on the commerce power even within the parameters of *Lopez* and *Morrison* is exposed, of course, by *Gonzalez v. Raich*,[24] in which a six-Justice majority upheld the authority of Congress to regulate the intrastate production and use of marijuana. Justice Stevens' majority opinion relied on none other than *Wickard v. Filburn*,[25] generally viewed as exemplifying the outer reaches of the commerce power, to uphold the application of the Federal Controlled Substances Act to homegrown and consumed marijuana which was completely lawful under California's Compassionate Use Act of 1996. The majority relied on *Wickard's* aggregation principle to conclude that homegrown and consumed marijuana, like the wheat in *Wickard*, could have a substantial effect on supply and demand in the interstate market. *Lopez* and *Morrison* were primarily distinguished on the ground that the activities regulated by the Controlled Substances Act are "quintessentially economic" unlike the regulations in the earlier cases.[26] Justice Stevens also concluded that the CSA was a

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circumstances, Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement of § 152 would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads. Consequently, both the original § 409 and the 1995 amendment can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce. As such, they fall within Congress' Commerce Clause power.").

[24] 545 U.S. 1 (2005).

[25] 317 U.S. 111 (1942). Justice Stevens relied on *Wickard* for its holding that even where the activity is purely local in nature, if the local activity has an impact on interstate commerce then Congress may appropriately rely on its authority under the Commerce Clause. *Raich*, 545 U.S. at 18 ("*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.").

[26] *Raich*, 545 U.S. at 25.

comprehensive regulation of commercial activity of which local production and use were only a part, whereas in *Lopez* and *Morrison*, the single subject statutes were challenged in their entirety as beyond the power of Congress to regulate activity with no interstate commerce connection.[27]

Raich is a hard case, and although it did not necessarily produce bad law, it did produce weird, if not predictable, results—at least for federalism after *Lopez* and *Morrison.* Certainly, the majority is correct that the Federal Controlled Substances Act regulates commercial activity generally, but home-grown and used marijuana is not commercial, and as Justice O'Connor points out in her dissenting opinion, there is no proof that it affects the commercial market, interstate or otherwise.[28] In fact, it seems more likely that a restriction on home production and consumption would affect the commercial market since patients denied the home stuff now will have to enter that market to satisfy their medicinal needs. To the extent that locally cultivated marijuana has some potential effect on the commercial interstate market, it certainly has no more than locally possessed guns.

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[27] *Id.* at 26. The majority noted that in *Lopez* the issue was:

> [T]he validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity.

Id. at 23 (citation omitted). Similarly, in *Morrison* a portion of the Violence Against Women Act was held unconstitutional because "like the statute in Lopez, it did not regulate economic activity." *Id.* at 25.

[28] *Id.* at 46-47 (O'Connor, J., dissenting). O'Connor notes that the majority opinion "allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme." *Id.* at 46. O'Connor states that if Congress can regulate purely local activity simply by implying that such a regulation is essential to the interstate regulatory scheme "then Lopez stands for nothing more than a drafting guide" because Congress could have regulated gun possession in a school zone merely by describing the crime as "transfer or possession of a firearm anywhere in the nation"—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. *Id.*

Irrespective of the congressional findings of the effect on interstate commerce of violence against women, *Morrison* is a case where Congress simply went too far. Violence is a subject generally regulated by state law and if its attenuated relationship to commerce can be reached through the Commerce Clause, virtually all criminal law can. *Lopez* itself can be viewed as the Supreme Court's reaction to federal over-criminalization,[29] but guns, wherever possessed, affect a commercial market in a way that violence does not. Even if *Lopez* and *Morrison* were a judicial reaction to the over-federalization of criminal law, *Raich* is an indication of the floor on federal power below which the Court cannot pragmatically travel. The fragility of *Lopez* and *Morrison* is exposed when the Court is faced with the reach of a federal drug law. Justices Kennedy and Scalia switch sides from their previous states' rights positions, and the Stevens wing of the Court gets hoisted on its own structural petard to allow the federal law to trump California's Compassionate Use Act. Justices Stevens, Souter, Ginsburg, and Breyer would normally be in support of a first-order substantive issue like the medicinal use of marijuana, but voted in favor of the federal statute's intrusion on California law to vindicate their earlier structural positions on federalism and the reach of the commerce power.[30]

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[29] *See* Gerald G. Ashdown, *Drugs, Ideology, and the Deconstitutionalization of Criminal Procedure*, 95 W. VA. L. REV. 1 (1992).

[30] More recently the Federal Circuit Courts of Appeal have held that Congress acted within its Commerce Clause authority under *Lopez* and *Morrison* when it passed the Sex Offender Registration and Notification Act (SORNA) (Pub. L. No. 109-248). SORNA sets minimum registration standards for sex offenders across the country. SORNA is based in part on congressional spending power. Any state whose sex offender registration system does not meet the minimum threshold required by SORNA by July 27, 2009, receives an automatic ten percent funding cut in Byrne Justice Assistance Grant funding (Byrne Grants are funds authorized by 42 U.S.C. 3750 et seq. and provided to states to assist in hiring police officers, purchasing law enforcement technology, and funding specialized law enforcement units such as a drug task force). Nonetheless, those convicted under SORNA have challenged their convictions arguing that the statute was impermissible in the face of *Lopez*. The Eighth Circuit considered and rejected the Commerce Clause argument in *United States v. May*, 535 F.3d 912 (8th Cir. 2008). The Court found that to be convicted of a SORNA violation a person must: (1) be a sex offender; (2) travel in interstate commerce; and (3) fail to register or update their registration. *Id.* at 920. Because the statute requires interstate travel, the Court

Maybe the oddest thing about *Gonzalez v. Raich*, as pointed out by Justice O'Connor's dissent,[31] is that its facts show exactly how federalism is supposed to function. The purpose of protecting states' interests in the federalism debate is to facilitate recognition and satisfaction of local interests and to allow for experimentation at the state level. This is exactly what happened in California and the other states that have opted for medical marijuana laws. California originally did it by statewide referendum.[32] Ironically, the limits placed on the commerce power by *United States v. Lopez* and *United States v. Morrison* did not even work when they were supposed to.

My point is simply this: the United States Supreme Court is not a very workable institution to significantly limit the federal commerce power without a wholesale return to the days of *Lochner.* Congress can use the channels approach (the amended Gun-Free School Zones Act after *Lopez*[33] or the criminal provision of the Violence Against Women Act[34]), requiring that the relevant commodity traveled in interstate commerce or the instrumentalities approach of *Guillen.* Even when the affecting commerce theory of *Lopez* and *Morrison* is relied upon, there seem to be practical and ideological barriers, illustrated by *Raich*, to limiting federal commerce authority.[35] In other

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was able to distinguish SORNA from the gun provisions at issue in *Lopez. Id.* at 922 ("SORNA includes an express and clear jurisdictional element for individuals . . . ."). The Eighth Circuit also distinguished the case from *Raich* by finding that SORNA was passed under the first two prongs of *Lopez*, that is that it regulated "use of the channels of interstate commerce" and "person or things in interstate commerce." *Id.* at 921. For that reason, it was not important for Congress to include findings that the regulated activities had a substantial impact on interstate commerce. *See id.* at 922. This analysis, upholding SORNA in the face of *Lopez*, has been adopted by other appellate courts as well. *See, e.g.*, United States v. Gould, 568 F.3d 459 (4th Cir. 2009); United States v. Whaley, 577 F.3d 254 (5th Cir. 2009); United States v. George, 579 F.3d 962 (9th Cir. 2009); United States v. Ambert, 561 F.3d 1202 (11th Cir. 2009); United States v. Lawrance, 548 F.3d 1329 (10th Cir. 2008). One federal district court did find that SORNA violated the Commerce Clause, but the Court's opinion was vacated on appeal. United States v. Powers, 544 F. Supp. 2d 1331 (M.D. Fla. 2008), *vacated*, 562 F.3d 1342 (11th Cir. 2009).

[31] *Raich*, 545 U.S. at 42-74 (O'Connor, J., dissenting).

[32] *Id.* at 5-6 (majority opinion).

[33] 18 U.S.C. § 922(q) (2005).

[34] Pub. L. No. 103-322, tit. IV (1994).

[35] *See infra* Section III.

words, there are pragmatic barricades to further Court action restricting congressional power under the Commerce Clause.

II. SOVEREIGN IMMUNITY AND SECTION 5 OF THE FOURTEENTH AMENDMENT

The combination of *Seminole Tribe of Florida v. Florida*,[36] which held that Congress could abrogate state sovereign immunity only under Section 5 of the Fourteenth Amendment and not under the Commerce Clause, and *City of Boerne v. Flores*,[37] interpreting Section 5 narrowly to disallow Congress from protecting "rights" more broadly than those identified by the Supreme Court, seemed to place substantial limits on the reach of federal authority over the states.[38] Taken together, these cases mean than Congress only has Section 5 power to regulate state government and that the federal enactment must be a "congruent and proportional" remedy to a constitutional violation identified by the Court.[39]

In a series of cases following *Seminole Tribe* and *City of Boerne* the Court struck down congressional attempts to abrogate state sovereign immunity under Section 5. In the first two cases, involving the same parties, the Court invalidated efforts to abrogate immunity for patent and trademark infringement. In *Florida Prepaid Postsecondary Education Expense Board v.*

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[36] 517 U.S. 44 (1996).

[37] 521 U.S. 507 (1997).

[38] *Id.* at 519 ("Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial'. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.") (alteration in original) (citation omitted).

[39] *Id.* at 519-20 ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.").

College Savings Bank,[40] Chief Justice Rehnquist's majority opinion held that for Congress to invoke its Section 5 power "it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[41] He added that the legislation was not remedial or preventive because "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations,"[42] which would have occurred if, as argued by the bank and the government, the states had been using sovereign immunity claims to deprive patent holders of property without due process of law. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[43] the Court invalidated a federal statute which subjected the states to suits by business competitors for false and misleading advertising. The Court concluded that the rights protected by the federal law were not the kind of property rights protected by the Due Process Clause, and thus Congress lacked the Section 5 power to pass the statute. Both of these decisions divided the Court 5-4 along identical lines with *Seminole Tribe.*

In the following two years, the implications of *Seminole Tribe* and *City of Boerne* became more ominous with the Supreme Court holding that Congress had exceeded its authority under Section 5 by allowing state employees to sue the states under the Age Discrimination in Employment Act (ADEA) and Title I of the Americans with Disabilities Act (ADA). In both of these cases, *Kimel v. Florida Board of Regents*[44] (ADEA) and

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[40] 527 U.S. 627 (1999) (striking down as unconstitutional the Patent and Plant Variety Protection Remedy Clarification Act as an invalid abrogation of state sovereign immunity).

[41] *Id.* at 639 (discussing *City of Boerne*).

[42] *Id.* at 640.

[43] 527 U.S. 666 (1999).

[44] 528 U.S. 62, 81-83 (2000) ("Applying the same 'congruence and proportionality' test in these cases, we conclude that the ADEA is not 'appropriate legislation' under § 5 of the Fourteenth Amendment."). The Fifth Circuit recently held that the Equal Employment Opportunity Commission could file suit on behalf of individuals alleging that a state violated the ADEA notwithstanding the decision reached in *Kimel.* EEOC v. Bd. of Supervisors for the Univ. of La. Sys., 559 F.3d 270 (5th Cir. 2009). The Court found it "well-established" that Eleventh Amendment immunity protected states from suits

Board of Trustees of the University of Alabama v. Garrett[45] (ADA), the same 5-4 majority as before concluded that precedent established that only irrational discrimination against the aged and disabled amounted to a violation of equal protection, and since Congress had identified no irrational discrimination by the states against either group, holding state employers liable failed the "congruence and proportionality" test of *City of Boerne*. These cases, from *Seminole Tribe* to *Garrett*, are efforts on the part of the Court to insulate the states from federal supervision in their operations and personnel decisions. They also guard state treasuries from depletion for failure to comply with federal regulations. The sovereign immunity cases thus clearly have the impact, and intent, of shifting power to state government.

But then the Supreme Court hit a floor below which it was unable to go in quelling federal power. In *Nevada Department of Human Resources v. Hibbs*,[46] the Supreme Court with a six-Justice majority[47] upheld the Federal Family and Medical

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by individuals, not by the federal government. *Id.* at 272. Even though the EEOC was acting on behalf of the individuals, the Fifth Circuit held that "the federal government always has a real and substantial federal interest in ensuring the states' compliance with federal law." *Id.* at 273 (quoting United States v. Miss. Dep't of Pub. Safety, 321 F.3d 495, 499 (5th Cir. 2003)). Therefore, despite the existence of state sovereign immunity from individual suits under the ADEA, states may still be subject to suit by the EEOC to vindicate the rights of individuals. State sovereign immunity, under this holding, will only go so far as to prevent individuals from filing their own suits. A floor has apparently been reached by the Fifth Circuit when the state has attempted to use sovereign immunity to evade accountability of all types for failure to comply with federal law.

[45] 531 U.S. 356, 374 (2001) ("Congressional enactment of the ADA represents its judgment that there should be a comprehensive national mandate for the elimination of discrimination against individuals with disabilities. Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in Cleburne. Section 5 does not so broadly enlarge congressional authority.") (citation omitted).

[46] 538 U.S. 721 (2003).

[47] Chief Justice Rehnquist and Justice O'Connor switched sides from previous sovereign immunity cases.

Leave Act (FMLA) which requires employers, including states, to allow eligible employees up to twelve weeks of unpaid leave to care for a new child or family member with a serious illness. Chief Justice Rehnquist's majority opinion noted that the FMLA was designed to protect against gender-based discrimination, and that Congress could have identified a pattern of state gender discrimination with respect to the allowance of medical leave.[48] The FMLA was thus a congruent and proportional remedy and prophylactic to guard against such gender disparity.[49] Distinguishing the previous cases, Chief Justice Rehnquist had this to say:

> We reached the opposite conclusion in Garrett and Kimel. In those cases, the § 5 legislation under review responded to a purported tendency of state officials to make age- or disability-based distinctions. Under our equal protection case law, discrimination on the basis of such characteristics is not judged under a heightened review standard, and passes muster if there is "a rational basis for doing so . . . ." Thus, in order to impugn the constitutionality of state discrimination against the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a "widespread pattern" of irrational reliance on such criteria. We found no such showing with respect to the ADEA and Title I of the Americans with Disabilities Act of 1990(ADA).
>
> Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.50

Consequently, Congress is on fairly firm ground, and federal power is at its strongest, where it is needed most—where there is evidence of historical discrimination against insular groups such as in the case of race, gender, probably sexual orientation, and maybe others.[51] It is here that a tendency toward state recalcitrance needs to be tempered by federal authority, and it is here where the Court's own equal protection precedents provide another floor on further limiting federal power vis à vis state sovereign immunity. That is to say, where there is a history of identifiable discrimination against some discreet and insular minority, the Supreme Court applies a heightened standard of review. This makes it much harder for the states to justify discrimination, and much easier for Congress to identify a constitutional violation. Section 5 power is left intact.

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[48] *See Nev. Dep't of Human Res.*, 538 U.S. at 730-34. Rehnquist discusses the statistical evidence before Congress when it passed the Federal Family and Medical Leave Act. *Id.*

[49] *Id.* at 734-35.

[50] *Id.* at 735-36 (citations omitted).

The same appears to be true regarding due process. In *Tennessee v. Lane*[52] the Court upheld Title II of the Americans with Disabilities Act against a claim of state sovereign immunity as applied to paraplegics who claimed they had been denied physical access to state courts. Title II provides, "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity."[53] Justice

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[51] In a number of cases, the Supreme Court has applied rationality with a bite where governments restricted rights in the areas above. For example, in *Romer v. Evans*, the Supreme Court, while not using strict scrutiny as it does in cases of race discrimination or intermediate scrutiny as in gender discrimination, struck down a Colorado constitutional amendment aimed at shutting out proponents of gay rights from portions of the political process. 517 U.S. 620 (1996). In *City of Cleburne v. Cleburne Living Center,* the Supreme Court struck down a city ordinance discriminating against those with disabilities, without applying strict or intermediate scrutiny. 473 U.S. 432 (1985). These cases demonstrate that the Court can sometimes strike down government action even under the usually easy to satisfy rational basis standard.

Congress's enhanced power when historic discrimination is in play was recently illustrated in a suit filed under the Government Employee Rights Act. Alaska v. EEOC, 564 F.3d. 1062 (9th Cir. 2009). In that case, the Ninth Circuit found that *City of Boerne's* congruence and proportionality requirement "applies only to prophylactic legislation; it doesn't apply to a direct remedy for unconstitutional conduct." *Id.* at 1068. Upon finding that the plaintiffs had alleged actual constitutional claims against the State of Alaska, the Ninth Circuit found that the Government Employee Rights Act validly abrogated Alaska's Eleventh Amendment immunity even without any consideration of whether the statute constituted valid prophylactic legislation.

[52] 541 U.S. 509 (2004).

[53] 42 U.S.C. § 12132 (2005).

Stevens writing for a five-Justice majority, with Justice O'Connor changing position from her previous state sovereign immunity votes, stated that here a fundamental right requiring heightened scrutiny of state behavior was involved, and that Congress had adequate evidence of state discrimination against the disabled in providing public services and access to public facilities including courts.[54] Title II's requirement of reasonable accommodation thus was a congruent and proportional prophylactic remedy for a constitutional violation under *City of Boerne* and not a substantive change in the law.[55] The major difference between *Lane* and *Board of Trustees of the University of Alabama v. Garrett* (Title I of the ADA) was that in *Lane* a fundamental right was involved requiring closer scrutiny of state conduct as in *Hibbs*. Since the record of state discrimination was even stronger than in *Hibbs*, Congress could validly abrogate state sovereign immunity. Similarly, in *United States v. Georgia*,[56] in which a paraplegic prisoner claimed that the state refused to accommodate his disability with respect to mobility and hygiene, a unanimous Court held that Congress could successfully abrogate state immunity because a direct violation of the Fourteenth Amendment had been alleged through the Eighth Amendment's prohibition on cruel and unusual punishment. Justice Scalia wrote that regardless of the debate on the Court over the reach of Section 5's prophylactic enforcement power, Congress could clearly create a private remedy against the states for an *actual* violation of the Fourteenth Amendment.

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[54] *Lane*, 541 U.S. at 523 ("The Due Process Clause . . . requires the States to afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings.") (citation omitted).

[55] *Id.* at 529 ("The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: '[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.' 42 U.S.C. § 12101(a)(3) (emphasis added). This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.") (alteration in original).

[56] 546 U.S. 151 (2006).

Hibbs, *Lane*, and *United States v. Georgia* thereby establish a floor on judicial limits on federal power. When Congress is dealing with a subject receiving any kind of heightened scrutiny of state action, and when Congress has collected evidence to support its conclusion of state abuses, federal power will be at its strongest even under the *Seminole Tribe* and *City of Boerne* precedents. Since it is with respect to suspect classifications and fundamental rights where state failures will be most acute and critical, federal power may not have suffered much under the Supreme Court's recent sovereign immunity decisions. Racial and gender discrimination, discrimination based on sexual orientation, and protection of fundamental rights like speech, religion, fairness in the criminal process, and certain aspects of privacy will remain in the federal quiver. In fact, we can expect lawyers defending federal authority, both inside and outside of Congress, to develop this legislative and litigation strategy. To the extent that enactments can be molded to fit within one of the above categories, they will be on much firmer ground when they make the states beholden. It is exactly this style of argument that should be made with respect to federal voting rights legislation.[57] The most recent Section 5 sovereign immunity cases actually may have strengthened the congressional hand here rather than crippling it as the earlier cases portended.

III. SOVEREIGN IMMUNITY AND THE BANKRUPTCY CLAUSE

In *Seminole Tribe* itself and the cases invalidating federal regulation of the states under Section 5 of the Fourteenth Amendment following *City of Boerne v. Flores*, the Supreme Court spoke broadly of the inability of Congress to abrogate state immunity utilizing any of its Article I powers.[58] The Court stuck to this conclusion regarding patents in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, disallowing abrogation under the Patents and Copyrights Clause of Article I, Section 8.[59] Nevertheless, trouble was brewing. Congress, of course, derives its authority to regulate bankruptcies under Article I, and although Congress unequivocally made clear its intent to abrogate state sovereign immunity with respect to most provisions in the Bankruptcy Code,[60] all but one circuit invalidated the attempted abrogation under the authority of *Seminole Tribe* where a "suit" against the state was involved.[61] The resulting exemption of state creditors from the bankruptcy system undermines the integrity of bankruptcy protection for both debtors and non-state creditors who are entitled to equal treatment.[62]

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[57] *See* N.W. Austin Mun. Util. Dist. One v. Holder, 129 S. Ct. 2504 (2009). The utility district argued that section 5 of the Voting Rights Act exceeded Congress's power to enforce the Fourteenth and Fifteenth Amendment because "Congress did not and could not show the 'exceptional conditions'" to justify legislation that it would not ordinarily have the power to pass." Appellant's Reply Brief at 9, N.W. Austin v. Holder, 129 S. Ct. 2504 (2009) (No. 08-322), 2009 WL 1028471. The United States argued that where Congress targets "conduct that is subject to heightened constitutional scrutiny" it has "greater flexibility in crafting appropriate remedies." Motion to Affirm at 14, N.W. Austin v. Holder, 129 S. Ct. 2504 (2009) (No. 08-322), 2008 WL 5079036.

The Supreme Court, evidently recognizing the problem created by its *Seminole Tribe* line of authority, granted review in a case from the only circuit, the sixth, to uphold congressional abrogation. *Tennessee Student Assistance Corporation v. Hood*[63] was an adversary action filed by a debtor seeking a hardship discharge of her student loans. A seven-Justice majority upheld the power of a bankruptcy court to hear this claim against the state, but did not resolve the abrogation issue. Instead, Chief Justice Rehnquist's majority opinion held that bankruptcy generally, and the dischargeability issue here, was an "in rem" proceeding involving the entire estate of the bankrupt and therefore was "not a suit against the State for purposes of the Eleventh Amendment."[64] Even though bankruptcy discharge can be viewed as in rem, it is not as easy to classify the individual discharge of an otherwise undischargeable claim, which government-backed student loans normally are,[65] as anything other than a personal action against the individual creditor, who, as a state, should be protected by *Seminole Tribe* sovereign immunity. Apparently, a majority of the Court saw the practical reality—and the failings, the floor—of its *Seminole Tribe* limitations on the Article I bankruptcy power of Congress vis à vis the states, and stretched the in rem concept to get around it.[66]

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[58] City of Boerne v. Flores, 517 U.S. 44, 76 (1996) ("The Eleventh Amendment prohibits Congress from making [a state] capable of being sued in federal court.").

[59] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 682-83 (1999). Justice Scalia notes that forcing a state to waive its sovereign immunity is no different than abrogating sovereign immunity, therefore holding consistent with *Seminole Tribe* that Congress could not subject the state to suit. *Id.* at 682.

[60] 11 U.S.C. § 106(a) (2004) ("Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . . .").

[61] *See* Susan E. Hauser, *Necessary Fictions: Bankruptcy Jurisdiction After Hood and Katz*, 82 TUL. L. REV. 1181, 1184 (2008).

[62] *See id.* at 1224-25.

[63] 541 U.S. 440 (2004).

The same stretch was much more difficult, however, two years later in *Central Virginia Community College v. Katz*,[67] in which the Court had to face the bankruptcy abrogation issue more directly. Again the case came from the Sixth Circuit which had followed its earlier abrogation holding in *Hood* to permit bankruptcy court jurisdiction in an adversary proceeding by the trustee to recover from a state agency a preferential transfer. This is precisely the example that the Court had distinguished in *Hood* as involving in personam jurisdiction.[68] Although it was theoretically possible to characterize the jurisdiction in *Hood* as in rem, *Katz* involved an attempt to recover a money judgment against the state creditor defendant.[69] It is hard to view this as anything but personal jurisdiction, which should be barred by *Seminole Tribe* unless the congressional abrogation in the Bankruptcy Code was successful.

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[64] *Id.* at 443.

[65] *See* 11 U.S.C. § 523(a)(8)(A)-(B) (West Supp. 2010) ("A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . . [U]nless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or an obligation to repay funds received as an educational benefit, scholarship, or stipend; or any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.").

[66] *See* Hauser, *supra* note 61, at 1202-08.

[67] 546 U.S. 356 (2006).

[68] 541 U.S. at 454 (expressly declining to answer whether a state creditor would be protected by sovereign immunity in this situation).

[69] 546 U.S. at 360.

Nonetheless, in a rambling and incongruous opinion for a five-Justice majority, Justice Stevens referred to bankruptcy jurisdiction as principally in rem and an action to recover a preferential transfer from a creditor as ancillary to this in rem jurisdiction.[70] But because of the unsatisfying nature of this attempt to avoid the implications of *Seminole Tribe* for at least this kind of bankruptcy jurisdiction (Justice Stevens disavows the dicta in *Seminole Tribe* regarding the application of its holding to the Bankruptcy Clause),[71] he went on. Relying on history, the majority opinion concluded that to the extent an action to recover for a preferential transfer involves in personam jurisdiction and the states' sovereign immunity, the states waived the immunity in the plan of the Constitution. Because of disparate state laws on bankruptcy, the framers elected to place the bankruptcy authority together with naturalization in Article I, Section 8, conferring on Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies."[72] This uniformity applied not only geographically, but to the treatment of parties as well, non-state and state alike, the states thereby consenting to jurisdiction and waiving their sovereign immunity.[73] The majority thus again avoided the abrogation issue, concluding that the Bankruptcy Clause of the Constitution itself worked the waiver.[74]

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[70] *Id.* at 362 ("Bankruptcy jurisdiction, at its core, is *in rem.*").

[71] *Id.* at 363 ("We acknowledge that statements in both the majority and the dissenting opinions in *Seminole Tribe of Fla. v. Florida*, reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. Careful study and reflection have convinced us, however, that that assumption was erroneous.") (citations omitted).

[72] U.S. CONST. art. I, § 8, cl. 4.

[73] *See* Hauser, *supra* note 61, at 1228-30. Hauser discusses the distinction between geographic uniformity, traditionally applied by the Supreme Court since *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902), and the new person based uniformity in *Katz.* Hauser, *supra* note 61 at 1228-30. Geographic uniformity only requires that the same bankruptcy law be applied across the country, thus limiting congressional power to pass bankruptcy legislation. *Id.* at 1229. An individual based uniformity requiring each individual to be treated the same under bankruptcy law expands federal power by permitting Congress to legislate at the micro level to make sure every debtor and creditor is treated the same.

This is a gem of a job in both circumventing and following precedent—it both avoids the implications of *Seminole Tribe* on the limits of Article I abrogation power and it is consistent with the notion of waiver in the Court's sovereign immunity jurisprudence.[75] To the extent that the states have consented to federal court jurisdiction, the question of congressional abrogation in § 106(a) of the Bankruptcy Code is irrelevant.

A comparison of Justice Stevens' historical analysis regarding bankruptcy to the history of other Article I powers yields curious results. As Justice Thomas points out in his dissenting opinion in *Katz*, the Commerce and Patent Clauses, "no less than the Bankruptcy Clause, were motivated by the Framers' desire for nationally uniform legislation,"[76] and this acknowledgment was the backbone of *Pennsylvania v. Union Gas*,[77] the case in which the Court had originally upheld congressional abrogation of state immunity under the Commerce Clause. Despite the fact that four Justices dissented in *Katz*, at least Justice O'Connor, who joined the four dissenters from the Court's previous sovereign immunity cases to make a five-justice majority, must have recognized the pragmatic difficulties with the inability of federal courts to assert jurisdiction over the states in bankruptcy matters.[78] The policies behind bankruptcy are to discharge the debtor with respect to all creditors, providing "a fresh start," and to treat all creditors as equally as possible.[79] Neither of these goals can be fully achieved when some creditors, like state units and agencies, are exempt. Likewise, private commercial creditors cannot accurately underwrite credit losses, which otherwise they can predict and for which they can capitalize, when some set of creditors are immune.[80] This makes application of immunity for the states in bankruptcy filings bad commercial policy. Again, the Court's federalism position hit the floor in *Hood* and *Katz* forcing it to meander around its sovereign immunity decisions.

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[74] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 373 (2006) ("Insofar as orders ancillary to the bankruptcy courts' in rem jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity. So much is evidenced not only by the history of the Bankruptcy Clause, which shows that the Framers' primary goal was to prevent competing sovereigns' interference with the debtor's discharge, *see supra* Part II, but also by legislation considered and enacted in the immediate wake of the Constitution's ratification.").

[75] *Katz* reaches a different result than *Seminole Tribe* while leaving intact the earlier case's conception of state sovereign immunity in all cases other than those involving bankruptcy.

[76] 546 U.S. at 384-85 (Thomas, J., dissenting).

[77] 491 U.S. 1 (1989). Justice Stevens was in the *Union Gas* majority, and was likely looking for a way to breathe life back into that decision, notwithstanding *Seminole Tribe*. Certainly *Katz* is more consistent with *Union Gas* than with *Seminole Tribe*.

[78] Justice O'Connor had previously stated, "Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause . .

What *Hood* and the Stevens analysis in *Katz* mean for the future of sovereign immunity law is unclear. Although the Court refused to allow Congress to abrogate state immunity under the Patent and Copyright Clause in *Florida Prepaid*, it is hard to imagine that any serious and continuous state violation of patent or copyright law could be tolerated. Another practical consequence of the Court's *Seminole Tribe* line of decisions is that it leaves many potential plaintiffs remediless for state violation of federal law (except for prospective injunctive relief against a state official under the doctrine of *Ex Parte Young*[81]), since the states are immune from suit in both federal and state court.[82] Justice O'Connor is gone and Justice Alito has joined

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. ." Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 104 (O'Connor, J., concurring). Justice O'Connor's change of heart also may be due to disaffection with the Bush administration. *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 206-53 (2007). "O'Connor's alienation from her party did not happen overnight, nor did it ever amount to a complete breach. Her rebellion took place mostly on issues relating to the culture wars . . . ." *Id.* at 208. "At first it was the legacy of *Bush v. Gore* that turned O'Connor and Kennedy toward their more liberal colleagues. Later, it was the Bush administration itself." *Id.* at 227.

[79] Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286-87 (1991)); Union Bank v. Wolas, 502 U.S. 151, 161 (1991); *see also* 1 COLLIER ON BANKRUPTCY ¶ 1.01 (16th ed. 2009).

[80] *See* Hauser, *supra* note 61, at 1234.

[81] 209 U.S. 123 (1908) (allowing plaintiffs in limited circumstance to enjoin state action by filing suit against state officials charged with carrying out the alleged unconstitutional state law).

[82] *See* Alden v. Maine, 527 U.S. 706, 754 (1999) ("We are aware of no constitutional precept that would admit of a congressional power to require state courts to entertain

the Court. It might be that Justice Alito could change the balance to provide a majority to overrule *Katz*, but *Katz* can be viewed as a decision protecting both debtors and commercial creditors, and in the latter sense might appeal to the conservative side (Chief Justice Rehnquist wrote the majority opinion in *Hood* and was joined by Justice Kennedy). Irrespective of the inconsistencies between *Katz* and *Seminole* Tribe, the Court came up against another pragmatic barrier in *Hood* and *Katz* to its policy of protecting the states from federal regulations much like the ones that arose with respect to commerce and Section 5, discussed earlier.

IV. THE SPENDING CLAUSE

The first clause of Article I, Section 8 of the U.S. Constitution, known as the Spending Clause, states "The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."[83] Congress has continually used this authority to impose requirements on the states through what is called conditional spending—grants to the states with conditions which must be satisfied attached.[84] The Supreme Court's key precedent here, *South Dakota v. Dole*,[85] permits Congress to use this power to regulate the states in ways that it could not directly. In *Dole*, for

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federal suits which are not within the judicial power of the United States and could not be heard in federal courts. . . . In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.").

[83] U.S. CONST. art. I, § 8, cl. 1.

[84] *See* Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 877 (2008). Footnote 5 of the article provides examples of legislation passed by Congress using the Spending Clause which places requirements on state governments as a condition of receiving federal funds:

> These programs include: the Individuals with Disabilities Education Act, 20 U.S.C. § 1407(a)(1) (2006); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006); No Child Left Behind, 20 U.S.C. § 6311(a)(1) (2006); Medicaid, 42 U.S.C. § 1396c (2006); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006); Clean Air Act, 42 U.S.C. §§ 7410, 7420 (2006).

Id. at 877 n.5.

[85] 483 U.S. 203 (1987).

example, Congress required the states to enact twenty-one-year-old drinking age requirements or suffer the loss of five percent of federal highway funds. Even though presumably Congress lacks the power to pass a national twenty-one-year-old drinking age law (and could not force the states to do so directly), the Court upheld the condition because the states were not obligated to accept it—they were given a choice. They could reject the requirement and suffer the loss of federal money. The Court did impose some limits on this kind of conditional spending, but they were marginal.[86]

The Court's own spending jurisprudence thus provides another barrier to judicial tinkering with the federalism balance. Although some have recommended restrictions on the use of the spending power to match limitations imposed by the Court on behalf of the states in other areas,[87] Congress remains free to regulate the states indirectly through conditional spending. Take, for example, the Supreme Court's commandeering decisions. They are not only fairly narrow in their own limitations on federal power, but they also can be easily circumvented by use of the Spending Clause. In *New York v. United States,*[88] Justice O'Connor's majority opinion held that Congress lacked the power under the Federal Low-Level Radioactive Waste Policy Amendments Act of 1985 to coerce state legislatures into regulating radioactive waste. Nevertheless, in the same case, the Court upheld provisions of the Act which offered the states financial incentives for such waste regulation. Likewise, in *Printz v. United States*,[89] Justice Scalia's majority opinion held invalid provisions of the Brady Handgun Violence Protection Act which commandeered state executive departments by requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers; but there is little doubt that Congress could have accomplished the same goal through either financial incentives or the withholding of federal law enforcement dollars for refusal to perform the checks.[90]

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[86] *Dole* places four basic requirements on Congress when using its Spending Clause Authority. First, the exercise "must be in pursuant of the general welfare." *Id.* at 207. Congress is afforded a great deal of deference in determining what constitutes the general welfare. Second, Congress must unambiguously place conditions on the receipt of federal funds so that states can make a conscious decision to either accept the funds and the restrictions or reject the funds and therefore the restrictions. *Id.* Third, restrictions on the receipt of funds must have some connection to a federal interest in the program or project. *Id.* at 207-08. The Courts have failed to define what this connection must be, and therefore this prong is a very limited barrier to congressional authority. Finally, the restrictions placed on the receipt of federal funds must be consistent with all other provisions of the Constitution. *Id.* at 208.

[87] *See* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995). Baker argues that the Supreme Court should reinterpret the Spending Clause "to work in tandem, rather than at odds, with its reading of the Commerce Clause." *Id.* at 1916. In order to make the Commerce Clause and Spending Clauses work in tandem, Baker suggests that the Court should presume that Congress cannot require the states to do anything as a requirement for receiving federal funds unless Congress could impose such a requirement under another portion of its Article I power. *Id.*

[88] 505 U.S. 144, 188 (1992) ("The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal

Similarly, after the decision in *United States v. Lopez*, President Clinton declared that he was "determined to keep guns out of our schools" and that Congress was free to "encourage states to ban guns from school zones by linking federal funds to enactment of school-zone gun bans."[91] Likewise, even though both the majority and dissenting opinions in *Lopez* identified family law and education as areas in which states

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Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them.").

[89] 521 U.S. 898, 935 (1997) ("We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

[90] Justice O'Connor's opinion in *New York* recognizes that Congress had other alternatives for accomplishing its goal while remaining consistent with the Constitution. *New York*, 505 U.S. at 188 ("While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal . . . .").

[91] *See* Baker, *supra* note 87, at 1913-14 n.8 (citing Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1).

"historically have been sovereign" and therefore presumably beyond congressional regulatory authority,[92] the federal government has been substantially involved in public education through the No Child Left Behind Act.[93] Again, this Act links federal education dollars to state compliance. Consequently, in addition to the natural barriers to judicial limitations on the commerce power discussed in Section I, the Spending Clause is a constant source of indirect federal regulatory authority even where the states could not be reached directly by federal power.

The states can even be asked to waive their immunity to private enforcement in exchange for federal money—the Individuals with Disabilities Education Act[94] is an example—and although this technique is used less often, it remains a viable option to circumvent the Court's strengthening of state sovereign immunity discussed in Part II. Indeed, the potency of the spending power, and its ability to skirt judicial restrictions placed on the federal government in favor of the states, has led to numerous calls for an alteration of judicial policy regarding spending to bring it more in line with Supreme Court federalism jurisprudence elsewhere.[95] So far, however, the Court has remained unbowed, leaving its own built-in floor impenetrable to any serious erosion of federal power.[96]

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[92] *See* Baker, *supra* note 87, at 1912-13 n.6. (citing language from both the majority and dissenting opinions in *Lopez* which cite education and criminal law as matters left to the states and not subject to Congress's Article One power).

[93] Pub. L. No. 107-110 (2002). In order to receive federal funds under No Child Left Behind, a state must establish a testing system for students in all grades. A school's average test score, among other factors, will determine whether the school achieves Adequate Yearly Progress (AYP) under the Act. Schools failing to meet AYP must improve their scores over time with the goal of all students receiving proficient scores by 2014. A school faces consequences such as a required improvement plan, being forced to allow students to transfer to higher performing schools, or a total restructuring if it continues to fail to meet AYP under No Child Left Behind. *See* ERIN DILLON & ANDREW J. ROTHERHAM, STATES' EVIDENCE: WHAT IT MEANS TO MAKE 'ADEQUATE YEARLY PROGRESS' UNDER NCLB 1 (2007), http://www.educationsector.org/usr_doc/EXPAYP.pdf.

[94] 20 U.S.C. § 1400 (2010); *See* Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (en banc). The Jim C. Court held that the State of Arkansas waived its Eleventh Amendment immunity by accepting federal funds under IDEA. *Id.*

[95] *See* Baker, *supra* note 87 and accompanying text; *see also* Galle, *supra* note 84. Galle argues that there is no justification for the judicial intervention to block Congress from conditioning the receipt of federal funds because state officials can choose whether or not to accept the funds along with the accompanying federal regulations. *Id.* at 876.

V. SUB-JURISPRUDENTIAL CONSIDERATIONS

A. National Politics

There is strong reason to believe that the national political process prevents some federalism issues from reaching the courts; thus providing a dynamic constraint on the ability of the federal judiciary to police the federal-state balance, even when the federal courts might be inclined to do so. The Federal Partial-Birth Abortion Ban Act of 2003 (PBABA) is illustrative.[97] Following *Lopez* and *Morrison* the power of Congress to rely on the Commerce Clause to pass the Act is questionable. Arguably, the regulation of a medical procedure is no more commercial than gun control or domestic violence or, if so, the

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Galle argues that state officials have some incentives to reject some federal grants that diminish state and local authority. *Id.*

[96] Recently, Congress has exercised its Spending Clause authority to move further into the realm of state policy decisions. The American Recovery and Reinvestment Act of 2009, better known as the Stimulus Package, provides federal funding to states for a wide range of activities designed to spur the nation's economy and insure the stability of state social welfare programs. Pub. L. No. 111-5 (2009). Provisions in the Act, however, require states to maintain spending levels in programs such as education, Medicaid, and unemployment compensation as a condition of the receipt of federal funds, even after most of the federal funding provided by the bill is exhausted. The stimulus package, acting through the Spending Clause, has therefore allowed federal policy makers to inject themselves into state spending decisions. *See* Editorial, *The States and the Stimulus*, WALL ST. J., Jan. 2, 2010, at A10.

Another example of Congress's use of the Spending Clause to inject itself into the state budget process comes from the current health care bill. The Senate-passed version of the bill requires states to expand Medicaid to cover all persons earning below 133 percent of the federal poverty level. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010). After 2016, all states (except Nebraska) are required by the bill to share in the cost of covering this expansion of Medicaid. Shailagh Murray & Lori Montgomery, *Deal on Health Bill is Reached; DEMOCRATS WIN OVER NELSON GOP Senate Leader Calls Measure a 'Monstrosity*,' WASH. POST, Dec. 20, 2009, at A1. Given that Medicaid spending is a major part of every state's budget, this policy decision made by Congress under the Spending Clause will have the effect of taking away the authority of states to decide how they will spend a large amount of their own money. As Congress expands its use of the Spending Clause, federal courts may soon be asked again to reign in federal power in this area.

[97] *See* Devins, *supra* note 12, and accompanying text.

limited number of late term abortions does not "substantially affect" interstate commerce.[98] Nevertheless, the issue was barely mentioned in the congressional debates surrounding the passage of the PBABA[99] nor was it raised in litigation challenging the statute;[100] the dynamics of the political process prevented the issue from arising. The pro-life, social conservative side that normally would align with restraints on federal power naturally supported the statute, and the pro-choice group who opposed the Act evidently was unwilling to challenge the use of federal authority, something that liberals generally favor. Although there may have been other reasons to avoid the commerce challenge,[101] social progressives would be extremely reluctant to give the federal courts, and ultimately the Supreme Court, the opportunity to place further limits on the federal commerce power. This systemic political dynamic thus prevented the federalism issue from reaching the courts.

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[98] Devins, *supra* note 12, at 465 ("Just as gun possession and domestic violence are not commercial activities (notwithstanding their impact on the economy), the absolute prohibition of one type of abortion (irrespective of whether there is a monetary exchange) is arguably a statement about morality that does not implicate any commercial activity. Second, even if such abortions constitute commerce, it may be that this infrequently used procedure does not "substantially" impact commerce. After all, a few million dollars is a drop in the ocean of our national economy.").

Devins cites discussions of the constitutionality of the partial-birth abortion ban in Allan Ides, *The Partial-Birth Abortion Act of 2003 and the Commerce Clause*, 20 CONST. COMMENT. 441 (2004); David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002); Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319 (2005).

[99] Devins, *supra* note 12, at 464 ("Even though the bill's constitutionality under the Commerce Clause was anything but clear, lawmakers, interest groups, and the American people ignored the bill's federalism implications."). As Devins notes, only two members of Congress discussed the federalism issue in Congress, and committee hearings did not consider the federalism issue at all, save one reference by a law professor witness. *Id.* at 466. *See also* 149 CONG. REC. S12914, 12938 (daily ed. Oct. 21, 2003) (statement of Sen. Feinstein); 149 CONG. REC. H4934, H4935 (daily ed. June 4, 2003) (statement of Rep. Paul); *Partial-Birth Abortion Ban Act of 2003: Hearing on H.R. 760 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 37-50 (2003) (statement of Gerard V. Bradley, Professor of Law, University of Notre Dame).

[100] *See* Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("I also note that whether the [Act] constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.").

[101] Devins, *supra* note 12, at 468. Pro-choice groups represent mainly political liberals who believe in a broad exercise of the federal commerce power. As Devins notes,

Even had the issue reached the Supreme Court, another judicial floor, discussed earlier, may have caused the Court to uphold the statute against the federalism claim. Like the facts of federal drug regulation pragmatically may have driven the outcome in *Gonzalez v. Raich*,[102] the regulation of late-term abortion may have sufficiently appealed to a majority of the Court to cause it to skirt any federalism challenge.

The political considerations that surrounded the enactment and litigation of the PBABA are sure to duplicate themselves preventing effective litigation of the federal-state issue in other cases. Also, as Neal Devins points out, first-order priority issues like abortion, gun control, the environment, and civil rights are likely to greatly overshadow second-order issues like the structural one of federalism.[103] This too may reduce the potential for the federalism issue to reach the courts. Thus, in addition to the judicial dynamics, discussed in this paper, that limit the ability of the Supreme Court to alter the federalism balance in any serious way, these political checks prevent the

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pro-choice lawmakers pushed federal legislation to provide freedom of access to abortion clinics—legislation that would be in constitutional peril if the partial-birth abortion ban was held to violate the Commerce Clause. Aside from the abortion issue, political liberals also typically believe in strong federal involvement in healthcare, education, and environmental regulation—all areas where congressional power could be weakened by a Supreme Court ruling narrowing the scope of the Commerce Clause. Political conservatives who ordinarily support *Morrison* and *Lopez* were the driving force behind the partial-birth abortion ban and were not willing to raise the federalism issue to derail their own legislation initiative.

[102] *See supra* text accompanying notes 26-30.

[103] Devins, *supra* note 12, at 461-64 (noting that abortion, as a first order issue, took priority over the federalism issue for conservatives seeking to ban partial-birth abortion); Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 133 (2004) ("Voters, even those who understand and value federalism, may nevertheless have strong overriding preferences about one or more substantive issues. Single issue voters are a classic and extreme example of this phenomenon. These voters are willing to subordinate secondary preferences (including federalism) in order to secure their first order preferences (typically the environment, civil rights, gun control, or abortion).").

issue from leaving the representative branches and reaching the courts. This too then operates as a practical floor on potential judicial inroads on federal power.

B. Judicial Politics

If one believes Jeffrey Toobin, Justices Sandra Day O'Connor, one of the stalwarts in the states' rights movement on the Court, became disaffected with the policies of the Bush Administration sometime during Bush's second term.[104] This could explain her change of position on the federalism issue in *Central Virginia Community College v. Katz*,[105] the case finding no state immunity in bankruptcy proceedings. O'Connor joined the Stevens wing of the Court in *Katz* to makeup a five-Justice majority rejecting the state claim of immunity in such cases, and she did this without a written opinion explaining her change of position. Although estrangement from the policies of the executive branch might not logically lead to a change of view on the federalism issue in favor of the federal government, dissatisfaction with the administration may have caused O'Connor to more closely examine her position on issues generally, leading to a switch where the practicalities of the question called for a change in position.[106]

More importantly, however, in relation to judicial politics is that both Justices O'Connor and Rehnquist are now off the Court, replaced by Samuel Alito and John Roberts respectively. Both Chief Justice Rehnquist and Justice O'Connor were leaders in the Supreme Court's federalism revival, and although the overall political dynamic on the court is not likely to change with Roberts and Alito on the bench in their stead, their views on federalism may not mirror those of Rehnquist and O'Connor. Other issues or jurisprudential philosophies may be more important. The decision last term in *Northwest Austin Municipal Utility District v. Holder*[107] may illustrate the point.

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[104] *See* TOOBIN, *supra* note 78, at 206-09. Toobin asserts that O'Connor's dissatisfaction with the conservative movement in general, and the Bush administration in particular, drove her to cast her swing vote on the Court in a more liberal direction in a number of cases during the last six years of her term on the Court.

[105] 546 U.S. 356 (2006).

[106] *See supra* Section III.

Northwest Austin raised the issue of the constitutionality of section 5 of the Voting Rights Act, the preclearance provision, which Congress had recently renewed for twenty-five years in 2006. A small utility district from Texas had sought relief from the preclearance obligation under the "bailout" provision of the Act or, in the alternative, a declaration that section 5 was unconstitutional. It was a clear opportunity for the Supreme Court, under new Chief Justice John Roberts, to apply the Court's precedents, most notably *City of Boerne v. Flores*,[108] to invalidate the law on federalism grounds. Under *City of Boerne* "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[109] Or as Justice Thomas put it in the dissenting part of his opinion in *Northwest Austin*, "for § 5 to withstand renewed constitutional scrutiny, there must be a demonstrated connection between the 'remedial measures' chosen and the 'evil presented' in the record made by Congress when it renewed the Act."[110] As Justice Thomas noted, it easily could be argued that the voting discrimination that had triggered the Act in 1964 no longer existed or Congress had no proof of its continued existence.[111] From this, the Court could have declared that there was no congruence and proportionality between the renewed Act and a constitutional problem identified by Congress, especially in light of the Act's twenty-five year extension.

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[107] 129 S. Ct. 2504 (2009).

[108] 521 U.S. 507 (1996). The briefs of the parties in *N.W. Austin* illustrate the two opposing views on the application of *City of Boerne*. The utility district quoted *City of Boerne* arguing that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *N.W. Austin*, 129 S. Ct. at 2512 (quoting 521 U.S. at 520). The government on the other hand, argued that Congress needed only a rational basis in order to pass section 5 of the VRA. *Id.* Chief Justice Roberts noted that under either test the section was constitutionally suspect. *Id.*

[109] 521 U.S. at 519-20 ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.").

[110] 129 S. Ct. at 2525 (Thomas, J., concurring in part and dissenting in part).

[111] *Id.* at 2525-26.

Nonetheless, after identifying the "big question," Chief Justice Roberts' opinion began by saying:

> That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions. We agree that the district is eligible under the Act to seek bailout. We therefore reverse, and do not reach the constitutionality of § 5.[112]

Roberts' short majority opinion then went on to conclude that the utility district was in fact a "political subdivision" under the Act (despite a statutory definition which appeared to exclude it) and therefore entitled to take advantage of the Act's bailout provision.[113] Relying on the Court's precedent which established that the Act's reference to "political subdivision" was often broader than the narrow statutory definition, Roberts' opinion was able to offer the district statutory relief without deciding a major federalism issue. Even though consistent with the new Chief's philosophy of conserving Court resources by deciding constitutional issues as narrowly as possible, *Northwest Austin* also has to be an indication that the new Justices on the Court do not have the same thirst for states' rights as did the Court under Chief Justice Rehnquist. As noted by both Justice Roberts and Justice Thomas, concurring in the judgment in part and dissenting in part, there is hardly a bigger encroachment on state sovereignty than federal incursion into state elections.[114] For former Chief Justice Rehnquist and Justice O'Connor, *Northwest Austin* would have been irresistible.

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[112] *Id.* at 2508 (majority opinion).

[113] The statute:

> [P]rovides a narrower statutory definition in § 14(c)(2): " '[P]olitical subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973*l*(c)(2). The District Court concluded that this definition applied to the bailout provision in § 4(a), and that the district did not qualify, since it is not a county or parish and does not conduct its own voter registration.

Id. at 2514 (alteration in original).

CONCLUSION

For roughly a ten-year period beginning at the end of the twentieth century, the United States Supreme Court limited federal authority on behalf of state autonomy by reducing the reach of the Commerce Clause, expanding state sovereign immunity protection, restricting the reach of Section 5 of the Fourteenth Amendment, and prohibiting congressional commandeering of the branches of state government under the Tenth Amendment. The policy behind these decisions, of course, was to protect state authority (and treasuries) with all the advantages (and potential incidental disadvantages) that this policy entails. But then this phenomenon ended rather abruptly. Others have pointed out this fact, but no one has attempted to explain it. This is where I join the discussion—to provide an explanation, and some insight into the future, as to why the Court's efforts hit a jurisprudential barricade (or a floor as I call it) beyond or below which the Court could not go.

Regarding the commerce power, Section 5 of the Fourteenth Amendment, and sovereign immunity, the Supreme Court simply ran headlong into its own precedents. With commerce, Congress can always use the channels or instrumentalities approach and, as *Gonzalez v. Raich* proved, the economic or commercial limitation of *Lopez* and *Morrison* is not much of a restriction on the commerce power. Also, as *Nevada Department of Human Services v. Hibbs* and *Tennessee v. Lane* show, congressional power under Section 5 is at its strongest where it is most needed, when the legislation touches a suspect classification or a fundamental right. The state sovereign immunity decisions likewise hit the federalism floor in *Central Virginia*

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[114] *Id.* at 2511; *Id.* at 2524 (Thomas, J., concurring in part and dissenting in part).

Community College v. Katz, where a majority realized that immunizing the states from federal bankruptcy jurisdiction would substantially interfere with bankruptcy policy. In fact in *Katz*, Justice Stevens' majority opinion employed a theory that would seem contrary to that of the Court in *Seminole Tribe*—that due to the need for uniformity in bankruptcy proceedings, the states sacrificed their immunity in the plan of the convention. The same could be said of the Commerce Clause. In addition to precedential limitations, the Court's commandeering cases imposed only minimal limits on Congress which, in any event, can be circumvented by use of the spending power.

Thus the Supreme Court's own jurisprudence has established a floor on shifting power to state governments. The only way for this natural jurisprudential floor to be circumvented would be through a major (and bold) decisional shift reminiscent of the days of the early twentieth century and *Lochner v. New York*, when the Court basically used its own judgment to implement national policy. But there also are political checks at work, both outside and seemingly inside the Court. As the Partial-Birth Abortion Act passage and litigation showed, social progressives are disinclined to attack the use of the commerce power and conservatives are more than willing to rely on Article I authority to push their agenda. The latter fact highlights another political dynamic. Federalism tends to get ignored in favor of first-order issues like abortion, gun control, and civil rights. Interest groups will use whatever level of government can further their cause. This leaves the issue of federal-state relations at the back of the bus.

Regarding the Court itself, Chief Justice Rehnquist and Justice O'Connor, who led the drive for state autonomy, are gone, and their replacements on the Court may not have the same interests on this issue. For example, Chief Justice Roberts has favored a policy of narrow judicial review, a policy which expressed itself in the recent decision of *Northwest Austin Municipal Utility District v. Holder*, where the Court avoided a significant federalism issue regarding voting rights, deciding the case instead on a much narrower issue of statutory construction. On the other hand, the Roberts Court exhibited a penchant for bold action in *Citizens United for Church* *and Christ v. FEC,*[115] invalidating a decades old ban on corporate campaign expenditures. The Supreme Court will likely have opportunities in the next several years to consider the extent of federal power over the states. The recent economic crisis has created an expansion of federal power into state budgeting through the use of stimulus money. It is almost inevitable that the states will eventually want to free themselves from federal mandates while keeping the federal funds. The current health care debate also includes discussion of how much control the federal government should have over state Medicaid programs funded in part by federal dollars. The coming years will show whether the current floor in the federalism cases is merely a temporary pause before a majority of the Court is able to take bolder steps, or whether the floor is permanent, ultimately judging the federalism cases of the late nineteenth and early twentieth centuries as outliers, leaving the political branches with broad discretion in exercising federal power.

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[115] 130 S. Ct. 876 (2010).

THE HAZARDS OF PRECEDENT: A PARAMETERIZATION OF LEGAL CHANGE

Charles N. W. Keckler[*]

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> Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigour, usefulness, and popularity, and then sinks perhaps into a decrepit and friendless old age. A few are still-born, some are sterile, other live to see their children and children's children in high places.[1]

INTRODUCTION

There are many ways to study legal change. Every lawyer studies it by reading decisions and statutes that establish one legal rule in place of another legal rule. For any particular event of this kind, there may be a great deal of information regarding what led to the change, why it happened as it did, and why that particular new rule was announced to replace the old rule. For example, *Brown v. Board of Education*[2] introduced a prohibition against segregated schools, which replaced the rule of *Plessy v. Ferguson*[3] that segregated facilities are permitted by federal law. Whole careers and numerous volumes have been devoted to understanding in great detail this transformation. Yet legal change as a *general* phenomenon remains rather obscure, hampered by lack of a precise definition. Surely it is much less studied in comparison to the sum total of thought devoted to specific legal changes (a literature comprising a considerable portion of all legal commentary). Nevertheless, the dynamics of change have been recognized as having a central role for jurisprudence, because how law comes into being, disappears, remains, and changes must tell us to a considerable degree what "law" is, and about the varieties of form it may take.[4]

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[1] George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193, 195 (1987) (quoting FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW FROM EDWARD II 561(1895)).

[2] 347 U.S. 483 (1954).

[3] 163 U.S. 537 (1896). The legal question in these cases, of course, is whether this conduct is forbidden by the Fourteenth Amendment, with *Brown* answering "yes," overruling *Plessy's* answer of "no."

[4] "Only the driest and most formalistic of jurisprudential theories takes a mere snapshot of law, dealing with it as if it came from nowhere and is going nowhere." Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 645 (1985); *see also* Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 527-28 (2000) ("The central challenge of juri-

Most broadly, this Article explores a new way to approach legal change, focusing on what seems a necessary first step – a surer way to get at a quantitative measure of the phenomenon. Currently there is no widely agreed upon measurement, although there probably is a rough understanding that the rate at which a system generates novel legal material would be the basis for one.[5] Put most simply, if one is engaged in the process of explaining legal change, it is necessary to define this dependent variable—and it must be a variable, because it would be quite improper to assume constancy, and thereby assume away one of the great debates about legal change.[6] Therefore, this Article seeks to contribute to the development of one method whereby numerical values can be attached to this variable. Until this is done, the myriad explanatory variables one can present as determinants of legal change remain difficult to assess.

In particular, this Article is premised on the idea that a fruitful approach might be to subject legal material to hazards analysis, which is a widely used statistical method used to study the rate at which relevant events occur in a population over time.[7] This characterization is at least consistent with how we usually conceive of "the law," especially the common law: as a body consisting of a large number of discrete binding statements, some of which change (lose) their binding status over time, *thereby* changing the law because the population of authoritative statements is now different, some elements having been removed from the body of the law, other elements intro-

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sprudence is to probe the dynamics of legal doctrine *as a process*.") (reviewing literature on the causes as well as the velocity of legal change).

[5] *See generally* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 792 (2002).

[6] *See* Priest, *supra* note 1, at 196. Priest reviews the debate among legal historians and theorists over whether law changes at an essentially constant rate, or if its dynamics are more complex and involve periods of significantly greater and lesser transformation. Properly defined, these hypotheses should be empirically distinguishable, and because a long tradition of scholarship has relied upon an assumption of a fixed rate of change, there is significant amount of material that could be called into question by this effort.

[7] *See* JUDITH D. SINGER & JOHN B. WILLETT, APPLIED LONGITUDINAL DATA ANALYSIS 330 (2003).

duced. Hazard analysis in the legal realm gives the likelihood a particular (type of) binding statement will in fact lose its authority—or in the statistical terms, that it will *fail*—over some period of time. In addition to describing the fate of precedent in general hazard terms, the main method employed to assess the *relative* rate of failure events is a series of Cox regressions that compare the survival experiences of different sorts of cases. The Cox regression model assumes that the likelihood a precedent will fail is expressible as the product of a baseline hazard rate and series of independent variables or "risk factors."[8] These explanatory variables thus affect the likelihood of failure by shifting the baseline hazard rate.

The different case characteristics identified empirically as risk factors form the core connection between legal theory and the empiricism of this Article. Types of cases can be compared to theoretical or normative expectations about what sorts of law should be subject to greater or lesser rates of change, as regulated by a stronger or weaker form of stare decisis.[9] In particular, it is widely thought that stare decisis should be strongest in cases interpreting statutes, weakest in cases interpreting constitutions, and operating at an intermediate level for common law precedents.[10] There is also an argument that stare decisis should be weaker when re-evaluating "procedural and evidentiary rules."[11] The Article tests these claims against judicial behavior in Illinois and partially confirms them, finding that constitutional cases are at consistently higher risk than statutory ones, but that procedural and evidentiary cases are less distinguishable. In the process of testing these distinctions, I found other, stronger, factors not related to the "hierarchical" origin of the cases which influence the empirical operation of respect for precedent, the presence of a dissent and whether the case is one involving criminal (rather than civil) law. The presence of these variables roughly triples the risk of overturning, and it is probable that many other case characteristics not analyzed in this study, and not always accounted for in theories of precedential adherence, also have substantial effects on the comparative rate of legal change.

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[8] DAVID W. HOSMER, JR. & STANLEY LEMESHOW, APPLIED SURVIVAL ANALYSIS 87-106 (1999).

[9] *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1364-69 (1988); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 656-57 (2001); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 388-93 (1988).

[10] Hathaway, *supra* note 9, at 656. *But see* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 719-22 (1999) (arguing that relaxed deference to constitutional precedents was rejected during the founding era and received only limited support until the late nineteenth century).

[11] Payne v. Tennessee, 501 U.S. 808, 828 (1991); *see also* Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 663 (2000) (claiming that changing the rule in such cases imposes smaller costs).

In addition to hazards driven by categorical variables marking the type of case involved, the Article also identifies and analyzes the continuous variable of a precedent's age. Inherent in the use of hazards analysis is the relation of risk to time at risk,[12] and it constructs the complex function that can track this changing risk to a precedent as an empirical matter. This casts some light on the significant normative and theoretical disagreement about whether age *should* strengthen the application of stare decisis. Characteristic of a traditional view about the treatment, Justice Scalia expressed this view:

> Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity. The freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it.[13]

The contrasting view is, broadly, that recent precedents are to be treated more charitably than ancient ones, as "a Supreme Court decision probably has the strongest claim to generating path dependency immediately after it has been created."[14] Initially, the Illinois Supreme Court seems to have held to the first view but shifted toward the second position some time after the Second World War, as reflected in scattered doctrinal discussions of stare decisis. Correlated with this doctrinal change was a detectable shift toward a less protective role for age in the hazards analysis. This increased risk to older precedents had the immediate effect of raising the mean age of overturned precedents by more than a decade, but it also had the consequence of increasing the overall rate of change. As hazard analysis makes clear, extending risk to older precedents puts a large body of law at potential risk for a longer time, increasing the amount of overturning that will eventually accrue.

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[12] *See* SINGER & WILLETT, *supra* note 7, at 341.

[13] South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (recognizing and rejecting the current view that the age of a precedent is a negative, or at best, neutral factor in deciding whether or not to depart from it).

It is important to note, however, the limitations of this analysis for measuring "legal change" in the broadest historical sense. For purposes of clarity at this exploratory stage of my methods, an examination of case law and the dynamics within case law offer an analytically tractable but obviously incomplete definition of "law" and legal change. This method ignores statutes, constitutions, regulations, or other sources of law, at least as targets of change,[15] although any comprehensive measure of legal change would naturally have to take into account events that occur within these bodies of authority (and the interactions these changes have with case law). In hazard analysis terms, the population of "law" is too small. Furthermore, although a purer definition would identify as the true law those "binding statements" contained *within* cases, for practical reasons the concern here is primarily with the fate of cases into which our system bundles a series of binding statements. The current inquiry restricts itself to one source of law, albeit an important one, a common-law court of last resort, generating (and occasionally repudiating) an associated set of norms backed by its authority.

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[14] Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 952 (2005).

[15] These changes outside case law do enter the analysis tangentially, because they will sometimes result in the "failure" of a case, usually though supersession, but the focus here is primarily on failures (i.e., overturning) by the institution that created the rule.

Just as "legal" is a limited notion here, so too is "change." Here, the focus is on "change" in the sense of "exchange"—trading one rule for another. This process involves the removal of one legal norm with a corresponding replacement by another, that is, an overruling or similar action. Although incomplete, overruling is defensible as a metric of legal change and has long been so regarded because "overruling behavior provides a direct measure of interpretative stability."[16] Moreover, it has the considerable virtue of being relatively simple and largely independent of the judgment of the analyst as to whether legal change has occurred or how important the legal change might be.[17]

Overruling should thus not be equated with change itself; it is a measure of one kind of change, namely substitutive change, occurring in one of the repositories of legal authority. It corresponds to what we say when we say an institution "changes its position," although this assumes there was a position to change. Thus, the amount of law continues to change by growth, but within the body of law, there is a measurable and variable amount of stability, as assessed by the rate at which norms are actively removed from authoritative status. Aside from the methodological point that the definitions used here can always be built upon, another justification for a narrow definition is that, to the extent this narrow definition is correlated with the "real" rate of legal change, measurements at different time periods and in different jurisdictions provide at least a relative sense of legal dynamics independent of the precise nature of the measure.[18]

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[16] Stefanie A. Lindquist & Kevin Pybas, *State Supreme Court Decisions to Overrule Precedent, 1956-1996*, 20 JUST. SYS. J. 17, 19 (1998). The authors plausibly claim that they are the first to engage in "any systematic study of the overruling behavior of state supreme court justices." *Id.* The idea that this is an important metric of the judicial system, is, however, an old one. *See* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 739 (1949) ("One measure of stability is the extent to which precedents are overruled.") Other recent work along these lines outside the SCOTUS context includes Allen Lanstra, Jr., *Does Judicial Selection Method Affect Volatility?: A Comparative Study of Precedent Adherence in Elected State Supreme Courts and Appointed State Supreme Courts*, 31 SW. U. L. REV. 35, 55 (2001) (looking at recent overruling practice in 12 states); Jeffrey T. Renz, *Stare Decisis in Montana*, 65 MONT. L. REV. 41, 56 (2004). Although he focuses on Montana, Renz uses a limited range of comparative data from other states possessing a similar court structure (where an intermediate appellate court is lacking), and unlike Lanstra or Lindquist & Pybas, makes use of computer-based case retrieval method containing elements like the one used here, although apparently considerably more labor intensive. *See id.* at 60 & n.48.

[17] *See, e.g.*, Jim Chen, *Judicial Epochs in Supreme Court History: Sifting Through the Fossil Record for Stitches in Time and Switches in Nine*, 47 ST. LOUIS U. L.J. 677, 721 (2003) ("One of the simplest measures of doctrinal activity is to count the number of decisions per Term that overrule previous decisions of the Supreme Court.").

In addition to overruling, which is the primary focus of this study, there are various sources of "normative instability" within case law, including reconsideration, reversal by a higher court (if any), and alteration of the norm by a different institution responsible for statutory or constitutional law. Some of these, like vacatur or reversal by a higher court, do not result in a replacement norm, and therefore, although contributing to the rate at which precedents can be said to *fail*, they are less certain guides to the type of normative instability most associated with change in the strict sense just discussed. This sort of "legal change" is represented by the repudiation by an institution of its own norm, classically termed an "overruling" in the case of a common-law court, although a court may use other formulations that amount functionally to a refusal to acknowledge a prior announced norm as authoritative in the area it purports to cover. What matters is rendering a norm no longer enforceable and binding and the varying probability that a norm will eventually lose authoritative status is what will be used as the measure of internal normative stability.[19]

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[18] By contrast, Priest supposes that the proper measure of legal change is a behavioral index of increased legal uncertainty among litigants, although he admits the data to determine this will only be available in selected instances. Priest, *supra* note 1, at 202. His estimate has the useful property that it can measure not just a change but the *intensity* of the change, as a rule may be replaced by a quite similar rule, thus creating little on-the-ground legal adjustment, or by a quite different rule, causing considerable legal change. In the measure employed here, these are treated equivalently as measures of legal change, so it is worth being cautious about a behavioral interpretation attached to these measures. Nonetheless, assuming intensity of legal changes is evenly distributed, the raw measure of overruling would still provide a measure of the sort of uncertainty examined by Priest, even without a scale for the extent overruling cases actually deviate from the cases they overrule.

In Part I, I describe the methods used to retrieve and code the cases of the investigated jurisdiction, some relevant institutional characteristics about the history of the Illinois Supreme Court, and the basic statistical and "survival" characteristics of the database generated by these methods. A notable result is that it appears the hazard to precedent generally has varied historically with a significant increase in risk detectable beginning around 1950 and continuing for many years thereafter; this change is connected with an increase in the age of the precedents a court chooses to overrule.

Part II describes the result of applying statistical methods to validate and explain the patterns of legal change present in the sample with particular emphasis on demonstrating how to go about extracting and assessing the influence of independent factors that affect the relative hazard of a case being overruled at some future time. Here the first three factors are ones theoretically indicated as likely to affect the relative rates of change—the presence of a constitutional, statutory, or procedural question in the case at risk. In addition, I assess the effects of a dissenting opinion to the case at risk and the presence of a criminal question; both are shown to create significant additional risks of failure more generally and specifically, overruling.[20] In addition, in order to show the effect of distinct judicial eras and, hypothetically, of differing legal attitudes toward change, I look at the body of precedent as it existed in 1950, at the start of the "modern" era. This analysis shows much greater overall stability than does *case law* viewed from 2005, together with patterns of increasing risk to particular types of precedents. These patterns appear to presage the greater risks of overturning that characterize the modern era.

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[19] The norms need not be legal; you could measure in theory the internal normative stability of rules of etiquette for example. Legal rules, though, are a special but important and accessible case of norms, and techniques developed in the explanation of legal change could presumably be helpful to the more difficult tasks involved in characterizing and explaining change in norms more generally.

[20] Alternatively, criminal cases or cases with dissents have, on their own terms, a higher background level of instability than other sorts of cases. It is important to note my neutrality on whether they should have a higher rate. *Cf.* Hathaway, *supra* note 9, at 654 (arguing for less enforced stability in areas where higher costs to path dependence can be identified). Probably they should, but determining the optimal rate of legal change seems, to me, logically posterior to determining the rate of legal change—which I am beginning here—extending this over many contexts, and then verifiably tracing negative and positive consequences to various levels of legal innovation.

In Part III, I compare the principal results of Part II with the limited evidence currently available for other state court systems and find broad consistency for the hazards to precedent. Period effects, in which "dynamic" courts expose the then-extant body of precedent to increased hazards, are shown to be present.[21] Having previously shown the institutional rate of change in Illinois to vary significantly over time, and non-randomly, I examine if the hazards analysis can illuminate the role of a more subtle legal element in legal change, the stare decisis doctrine, conceived of institutionally as a "meta-norm" that governs the rate of change. Specifically, the question becomes whether variations in the hazard to precedent and thus, the rate of change, can be attributed in part to variations in doctrine. Because of the difficulties of gaining an independent measure of stare decisis, the results cannot be conclusive, but a more qualitative assessment of overruling case law indeed shows at least a correlation between doctrinal shifts toward a "looser" version of stare decisis post-1950 and the increase in the propensity to overrule. Whether the new legal rule (about legal rules) is merely a post-hoc rationalization is one among a number of questions highlighted for further research.

Finally, I consider briefly some possible normative and theoretical implications of the current study, despite its limitations. The principal result is to suggest that the debate over the proper attitude towards a precedent's age is likely to be a consequential one, with implications for the overall level of stability of an institution's case law, and thus deserving more emphasis in the literature. Whether the traditional or modern approach is actually normatively superior, after accounting for any costs of change, depends on the relative strengths of the reliance argument made by the traditionalists and the modernists' argument that norms optimal under past social conditions are unlikely to be optimal in different social conditions. In the absence of an empirical literature addressing these contentions directly, possibly the wisest course would be to treat the age of a case *per se* as largely irrelevant in the stare decisis analysis and evaluate these rival claims in the context of that case, or perhaps, that particular area of law.

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[21] Courts overturning many precedents are sometimes considered "activist." *See, e.g.*, Renz, *supra* note 16. The Article will employ the term "dynamic" instead, since it seems less normatively loaded. Moreover, an "activist" court carries with it the usual meaning of a court engaged in asserting itself vis-à-vis other normative institutions such as the legislature. By contrast, we are primarily concerned here with the assertiveness displayed by a court with regard to *its own* past actions. There is a manner in which these are related, as discussed *infra* in Part III, because courts can vary in how they allocate responsibility between the legislative and judicial branches for the alteration of contested judicial decisions. Nevertheless, it would be inaccurate to assume a court active in one way is sufficiently active to be called an "activist" court—if this description can indeed even be given a technical rather than merely rhetorical interpretation.

I. THE DEMOGRAPHY OF ILLINOIS CASE LAW

Case law has been characterized as "the collective and collected wisdom amassed over decades, of an appellate bench" consisting of the number of decisions.[22] More neutrally, it can be considered as a jurisdiction's "legal capital,"[23] one form of it in any event, employed by the jurisdiction to regulate behavior and resolve disputes. The amount of "law" (so delimited) a jurisdiction can be said to have is the total body of valid, binding, precedent—a constantly expanding number, even if one limits this further to the opinions produced by the highest court in a jurisdiction. As the epigraph to the Article suggests, the normal fate for precedents is not in fact "death," since they continue to remain on the books and at least hypothetically accessible as legal authority. Rather, most legal precedents enter into a decrepit state of "old age" or more precisely they become moribund and inactive. By hypothesis, some insight into the socially meaningful amount of change in this system can be gained by examining variations in the failure rate of that small group of precedents which actually fails, especially the subset of this group that is actively rejected by the institution that issued the opinions in the first place.[24]

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[22] Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 183 (1985). Caldeira used the number of "running feet of legal reports each state supreme court has produced from its inception until 1970" but acknowledges that he would have preferred to use the number of decisions. *Id.* Because the perspective taken here is that the nature of legal capital is the production of legal norms, this latter enumeration makes more sense, and it is in effect necessitated by the manner in which decisions are acted upon in a common law system. All norms are embodied in cases, and it is the case which is cited, adhered to, or departed from. Theoretically, one could attempt to dissect cases into their relevant holdings and trace these separately, but as a practical matter, even a case only overruled in part is unlikely to have much vitality left. It would seem likely that its adhered-to elements are carried forward by reference to successor cases not containing the overruled element.

[23] William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976). Like other forms of capital, the usefulness of a particular precedent will usually decline over time, a decline that has been estimated for the cases of the Supreme Court of the United States (SCOTUS) at 6.5% yearly. Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices,* 27 J. LEGAL STUD. 333, 348 (1998).

Usually, to paraphrase Douglas MacArthur, old precedents never die, they just fade away. Because of this feature, among others, legal precedents are actually *unlike* living organisms,[25] and it is important to be cautious in taking any biological analogies about their "life course" too far.[26] This admonition is especially worth making because the formal methods used here to study the "survival" of precedents are most commonly employed in the life sciences. The justification for doing so is simply that legal cases do have *formal* similarities with, say, patients of differing vulnerability, who are subjected to different courses of treatment and who are then evaluated for how long they live.

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[24] The main type of change that is *not* covered by analysis of this sort is the progressive transformation of behavior from legally ungoverned to legally governed; that is, the regulation of social and personal behavior by the law as opposed to regulation via informal means (or a lack of normative concern). Although most accumulated precedent simply replicates past precedent, an important role of courts is in the establishment of "new rules." If these new rules do not reference a past legal analysis, they are not picked up by the methods used here. To return to the *Brown v. Board of Education* example, if *Plessy* had not existed, and segregation had simply occurred by the *implicit* permission of the courts, *Brown* would still have been momentous but would not have been an overruling of a past case, and thus not "a change in the law" in the admittedly rather crabbed definition used here.

[25] It would be difficult, for example, to treat precedents as "reproducing" unless one pointed out "descendant" cases citing numerous sources of authority have many "parents." Likewise, it is implausible to directly apply the analogy of precedents "competing" in some sort of semi-autonomous way for representation in the future. *Contra* Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 JURIMETRICS J. 291, 307 (1999). Precedents and subsequent cases relying upon them are not replicas of one another, and cases regularly used as authorities (a small subsample) are at the same time those cases a commonsense perspective will deem as most important and successful and yet also those which a system may reevaluate and possibly overturn. Moreover, such cases are often part of the dialogue by which the law progresses toward a new and possibly improved set of rules. When death is correlated with "success," we have moved beyond where a biological analogy is helpful.

But an even closer, if still imperfect, analogy to legal precedents is to other forms of durable capital produced as discrete units, such as automobiles. Like cars, precedents are produced in multiple varieties and used in various ways. Depending in part on how well they are engineered, they last a longer or shorter period of time; in addition, if cars are subject to more dangerous road conditions, they are more likely to break down. Moreover, most vehicles find their end not in fiery collisions with other vehicles, but in gradual disuse, and then relegation to the junkyard, where they rust away, possibly used for the odd spare part now and then. Yet more pertinent, opinions are likewise cultural artifacts "engineered" using available materials, to accomplish a function, and one aspect of the quality of engineering is simple durability.[27] Engineers, like doctors, subject their work to the kind of "failure analysis" used here to study law attempting to determine the intrinsic and extrinsic factors that affect the "active lifespan" of a product. The simple replacement of "rust" (for cars) with "dust" (for cases) does not make this analogy complete—unlike vehicles, "failure" of precedent generally connotes the substitution of an alternate precedent and is motivated by the perceived superiority of that substitute. However, it serves to underline the point that legal opinions are crafted entities, whether made poorly or well, are designed for the fulfillment of a social need, and may be subject to hard use or the turn of social fashion against them. All these traits are likely to affect how subsequent history treats a case and the rules of law embedded within it.

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[26] For instance, Justice Jackson once claimed somewhat ironically: "It might be thought that if any law is to be stabilized by a court decision it logically should be the most fundamental of all law . . . [but] constitutional precedents are accepted only at their current valuation and have a mortality rate almost as high as their authors." Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A. J. 961, 962 (1953). There are insights contained in this statement, but it overstates the demographic reality. The vast majority of the constitutional precedents generated by the SCOTUS during Jackson's tenure "live" on today.

[27] *Cf.* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 195 (1921) (discussing the "engineering interpretation" of the law). Unlike Pound, I make no attempt here to analyze what laws *should* do, or even what they are doing, the goal being to observe their obvious malfunctions when they implode in the process of doing whatever it is we are trying to have them do.

Most of the prior empirical research into the determinants of legal change has focused on the United States Supreme Court,[28] a unique institution, and although its attraction to commentators is obvious, it will inevitably leave them with a sample size of one. The SCOTUS is clearly an unusual and biased sample, rather unlike any other court in the nature of its cases, and abnormal in its tenure and probably dynamics.[29] An additional problem is that the fractured style of opinion making on the Supreme Court often leads to spirited commentary over whether and when prior cases have indeed been overruled, and this complicates the basic data used in this project to measure legal change. For these reasons, the method outlined in this Article has been prototyped using a state supreme court, namely the Illinois Supreme Court (ISC), which began operation in 1819, and has issued approximately 50,001 substantive opinions since that time.[30] The dynamics of the ISC, once explicated, are more likely to be comparable to the other forty-nine state supreme courts, facilitating the long-term objective of extracting common features (and variable determinants) of legal development.[31] Identifying these factors will generally require a comparative study to eliminate any peculiar institutional factors present in a single state.[32]

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[28] *See* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721, 722 (2000) (describing studies done with Judicial Database).

[29] Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 285 (1997) (suggesting the Court has an unusual concentration of "close" cases where small differences attributable to ideology might determine outcome); *see also* Gerhardt, *supra* note 14, at 955 ("The dynamics of the nation's highest appellate court – the Supreme Court – are unlike those of any other court."). This seems to be on the one hand inarguable, since its duties and docket are different. On the other hand, though, as an institution it might well be that its dynamics in the cruder sense of the parameters of its norm-generation, such as rates of overruling, or its reactions to personnel changes, or its level of insulation from political pressure, could be more or less similar to other courts. These are empirical questions.

[30] The composition of the data set is discussed further in Part I, *infra*. The term "substantive" means practically the exclusion of purely procedural or nonprecedential

The method employed by this study consists of two basic steps, an automated form of data collection and an analysis of this data using, *inter alia*, a variety of techniques more commonly applied in demography or engineering in order to estimate "lifespan" or "time to failure" of court precedents. Taking one of the commercial legal databases (Westlaw), all cases coded as "bad law" within a particular jurisdiction were collected.[33] Using a system of relatively straightforward programming applied to the cases so identified, complementary tables can be generated of all "failed" cases together with the later decisions that caused them to go bad—the "terminating" or overruling cases.[34] Some cases "fail" because of reversals by

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"opinions" such as denials of review; theoretically it means the cases contain one or more binding statements that could be the subject of a later overruling.

[31] This will be the subject of a future article as the techniques outlined here are generalized and refined. A limited amount of data does exist for a few states, *see supra* note 16, and is used comparatively, *infra*, in Part III. The software and methods described here are being adapted for use in a fifty state survey of overruling funded by NSF grant SES #0550618, "Predictability and the Rule of Law: Overruling Decisions in State Supreme Courts," with Frank Cross and Stephanie Lindquist as principal investigators.

[32] *Cf.* Hathaway, *supra* note 9, at 655 (proposing that different rates of legal change are optimal for different areas of law).

[33] Cases were collected through the end of 2005. These are the "red flagged" cases so familiar to disappointed attorneys. Essentially, these cases can then be checked by a WestCheck procedure to identify and extract the subsequent negative history that caused the red flag. To some extent this coding is self-fulfilling: if routine cite-checking indicates a case to be bad, it *is* bad law because it is manifestly unlikely it will be cited to a court.

[34] I include in the data set the Illinois Supreme Court case ranked highest in the WestCheck output. For example, if one case overrules another, that case enters the data set, but if a later or earlier case "recognizes the overruling," it is not included. If the Illinois Supreme Court has not ruled on a case (only an appellate court or the court of another state), it is included in the broader definition of a failed case, but it is not classed as generating an "overruling."

the SCOTUS; others are withdrawn by the issuing ISC or are superseded by subsequent legislation.

Although the risks of these events are important, overruling is the main source of failure and the one most tied to considerations of legal change. Therefore, there are *two* codings for failure: one for all cases with a negative subsequent history, and one (a subset) for those cases whose negative history is caused by a later case that effectively overrules them. The great majority of precedents (over 98%) have not failed, although the convention of hazard analysis is to say they have *not yet* failed, they will—mostly—no doubt remain technically "good law" until the end of time. These cases are what statisticians call "censored," specifically "right-censored"—the relevant event of their demise (on the "right-hand" end of their history) is not observable, so their lifespan is indeterminate. The hazard function, then, is created by the small percentages of cases that fail and the pattern of this failure.

A. Data Collection

The specific method of counting departures from precedent is to use the Westlaw database to identify all opinions issued by the court and the date they were issued, then to identify and code which of these have subsequently been overruled (or "disavowed," "abrogated," "decline to follow" and other terms), via an automatic process employing software developed in Perl.[35]

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[35] Do a "search" on Westlaw using "Court" field, "CO," using the unique designator for the jurisdiction of interest (example: CO("Ill.") excludes intermediate appellate opinions). The search may have to be narrowed using the citation, "CI," field to exclude "Table" cases, primarily because Westlaw prevents the generation of more than ten thousand returned citations. This produces the search string: CO("Ill.") % CI("Table"). For the same reason, it may be necessary to break the search into periods of time in which the jurisdiction generated under ten thousand opinions. Save or deliver this output as ASCII text file. This will convert visual markers of negative history such as red flags to searchable text "RED FLG." Each citation in the output will be preceded by number "1., 2.," and so forth. These text files then provide the input for database creation and text processing commands in Perl scripts, as each becomes a record in a database. Records that contain a positive entry for a red flag are extracted in a separate text file and prepared for further processing by WestCheck (at the current time, these too must be "chunked" into separate text files of ninety-nine or fewer records) for the use of this procedure.

Then, the records of these cases are run through the "West-check" cite-checking procedure, which generates further information such as, crucially, the date of the failure event, as well as the later citation that caused the precedent to be coded as failed.[36] Other Perl scripts extract and integrate this information into the database of surviving and failed precedents.[37] Effectively, this is a form of what might be called "universal Shepardization."[38] By searching for a subset of these cases containing a particular feature of interest (such as a dissent or a rule of constitutional law) and merging the result with the whole database, an unlimited number of indicator variables (and potential predictors) can be attached to each "individual" case belonging to the case "population."

Illinois and, in particular, the output of its Supreme Court, has served as the basis for developing this system. In principle, it is designed for general applicability in any institution that records, and largely but not completely, follows precedent. However, by its nature, this method requires examination of the *entire* legal history of a court (in order to collect all overruled cases). It is possible the Illinois Supreme Court will overturn a precedent from the 1820s tomorrow. Unless the *entire* population of precedents is examined, the fact that such a precedent has gone bad will not be apparent, and consequently, it will be impossible to trace an overruling case from it. Alternatively, if one starts from an examination of cases that overrule other cases, one can indeed obtain a rate during the period of investigation of precedential departures, but aside from the uncertainty and tedium of trying to find such cases as a starting point, this procedure will not give an accurate picture of the true risk to any particular case or type of cases. Older cases overruled recently (during the study period) are fewer in number and possibly distinct from cases issued in the same period but which failed at a younger age.[39]

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[36] Essentially, WestCheck, for each set of "bad" cases, generates information about why each one is bad in a downloadable report, normally citing a subsequent opinion that invalidated it, and the date of that later citing opinion. This can be saved as a text file processed by a Perl script into database format with records organized by the citation under analysis. These records can then be merged back into an overall database which now can show not only which cases are red-flagged but why and when they became so.

[37] The data in Excel spreadsheet format, as well as the software used to generate it, are available from the author. Currently, the primary way to collect a list of these overruled and limited cases is the manual inspection of the relevant Shepard's volumes and supplements. For instance, recent researchers found "it was necessary to review the *Shepard's* volumes, page by page, to identify the overruling decisions. Therefore, we examined thousands of pages of *Shepard's Citations* for each state supreme court's decisions to identify all cases overruled after 1965." Lindquist & Pybas, *supra* note 16, at 21. Obviously, this is an "extremely time-consuming [way] of collecting data." *Id.* at 20; *see also* Lanstra, *supra* note 16, at 45 ("Opinion data was collected by manually examining Shepard's Citations paper copies of the Northwestern Reporter and the Northeastern Reporter. Each page of the supplements containing the years 1995-1999 were individually surveyed for cases that had been 'overruled.' The citations listed in the supplement for the overruled cases and the pinpoint citations for the overruling cases were then noted.").

[38] There is nothing definitive, of course, about the coding done in the Westlaw database, either in terms of the legal judgments involved or in the characterization of the relationship between earlier and later precedents. The research virtues of using West's flags are: first, that anything done with them is easily replicable, and second, that the coding has been done (by Thomson/West) independent of the researcher and of any research hypothesis.

For instance, Padden conducted a basic "rate" analysis of overruling on the U.S. Supreme Court, concluding that "recent cases are not more subject to reversal as an empirical matter."[40] But this is an incomplete analysis because the correct measure of being "subject to reversal" is the *risk* of overruling. Padden states that "only" 11/84 overruled cases were less than four years old. But since this is 13% of the sample out of the approximately two hundred years of precedents, of which four years is only 2%, it really implies that the per/year hazard is *greater* for recent rather than early cases. Conceiving precedents as a population, unless a court is in its early years, there are far fewer "recent" precedents than there are older ones, and the latter have been subjected to many more opportunities for a potential overruling. Avoiding problems of this type is a principal rationale for the use of the type of models presented here, as well as the use of the complete history of any court under study.

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[39] A consequence of this is that while the researcher may obtain an accurate count of the number of cases overruled between, say, 1970-2000, and of the number of overruling cases during that time, there will not be an accurate count or distribution of the overruled cases. That is, most of the overruled cases counted will have originated in the decades of the study or just prior. If precedents from the 1950s were overruled *before* 1970, they will be invisible—the precedents from the 1950s overruled *after* 1970 are likely to be a biased sample of the precedents from that era, even of the type of "weak precedents" prone to fail. Hence, if there is something intrinsic about precedents from the 1950s that gives them greater hardiness or vulnerability, such *period-of-issue effects* will be missed, unless all the time that they are at hazard of overruling is considered. *Cf.* Chen, *supra* note 17, at 734 (finding that periods of overrulings, equated with "dynamism" correspond to personnel turnover).

[40] Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After* Payne v. Tennessee, 82 GEO. L.J. 1689, 1719 (1994). This issue arose because an arbitrary category of "recent" had fewer cases than "not recent" precedents.

B. Number of Precedents Overturned

As reflected in Table 1, at the current time, the ISC hears and opines on about 200 cases every year, a figure stable for several decades.[41] Between 1819 through 2005, the court had overruled or otherwise seen the effective demise of 733 of these previous cases. This was approximately one and a half percent of its total output of substantive cases (memorandum cases and other non-precedential rulings were omitted). Cases that the court itself eventually overruled constituted a little under one percent of all its opinions.

Table 1. Illinois Database of All and Failed Cases

Period	Issued	Failed	Failure Rate	Overruled	Overrule Rate	Overrulings
1976 -2005	6070	160	2.64%	75	1.24%	208
1951-1975	5955	136	2.28%	87	1.46%	152
1926-1950	7133	145	2.03%	100	1.40%	34
1901-1925	11022	119	1.08%	109	0.99%	40
1876-1900	9680	99	1.02%	63	0.65%	40
1851-1876	8626	55	0.64%	52	0.60%	24
1819-1850	1515	19	1.25%	18	1.19%	6
TOTAL	50001	733	1.47%	504	1.01%	504

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[41] The court's caseload actually peaked at about 500/year between 1870 and 1880 (before intermediate appellate courts had been established), falling to 250/year in the next decade. This rose back up to 450/year in the early years of the twentieth century, principally because of the large mandatory jurisdiction of the court, until the Civil Practice Act of 1907 offered some relief, creating caseloads of about 350/year between 1910-1935. After the Civil Practice Act of 1933, which eliminated writs of error and other anomalies, the 200/year caseload has subsequently characterized the court.

Of these 733 failures, 504 are coded as having been overruled (or words to that effect),[42] and therefore as having failed for that reason. These 504 cases originate beginning in 1822.[43] Their failures have been affected by other, later, ISC cases, a process of departure from its own precedent that began in 1832[44] and continues up through 2005. Necessarily, there have been 504 incidents of overruling, sometimes occurring simultaneously (because some overrulings reject multiple precedents). Because recent cases have had little time to be rejected, most recent failure is due to reversal by the Supreme Court or other phenomena aside from classic overruling.[45] Comparing these two series of cases, overruled and overruling, both derived from the same institution, it is possible to track the level of legal volatility, which could be equated to relative adherence to precedent.[46] This is shown in Figure 1 (failure refers only to failure by overruling), which overlays a very rough time trend and appears to show a significant inflection point in overruling activity around 1950.

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[42] The codes considered as "overruling"—the narrower code for a failure event, along with their frequencies within the set of 504 cases, are Illinois Supreme Court cases with the following codes: Abandoned (4), Abrogated (25), Abrogation Recognized (35), Criticized (2), Declined to Follow (15), Disagreed With (6), Disapproved of (22), Disavowed (3), Implied Overruling Recognized (12), Overruled (46), Overruled in Part (231), Overruling Recognized (99), and Receded From (4). The non-overruling failure codes include the following codes: Affirmed in Part, Reversed in Part (2), Appeal Decided (1), Appeal Denied, Judgment Vacated (3), Cause Transferred (1), Certiorari Granted, Judgment Vacated (10), Certiorari Granted, Judgment Vacated in Part (1), Decision Affirmed in Part, Reversed in Part (1), Decision Reversed (2), Decree Reversed (1), Judgment Affirmed in Part, Reversed in Part (4), Judgment Reversed (48), Judgment Set Aside (1), Judgment Vacated (8), Judgment Vacated in Part (1), Modified and Superseded (1), Opinion Modified and Superseded (3), Opinion Superseded (12), Opinion Superseded on Rehearing (8), Opinion Vacated (1), Opinion Vacated and Superseded (2), Opinion Withdrawn (1), Order Vacated (4), Order Vacated in Part (1), Order Vacated on Reconsideration (2), Order Vacated Without Opinion (3), Reconsideration Granted, Order Vacated (1), Republished At (1), Reversed (40), Reversed in Part (1), Superseded (1), Superseded by Constitutional Amendment (9), Superseded by Rule (3), Superseded by Statute (47), Superseded by Statute/Rule (2), or Vacated and Remanded (2). A difficulty is raised by a small number of cases where the red flag is generated externally to the issuing court, for instance, where an "overruling" is recognized by a court other than the Illinois Supreme Court. I have, somewhat reluctantly, accepted the third party (Westlaw) assessment of these cases as having become "bad law." This might reflect the practical reality of litigation—few lawyers would use such cases as authority. One might further assume that these actions represent a judicial commentary on a largely contemporaneous view of the Illinois Supreme Court and thus might reasonably be said to provide some information, albeit more indirect, about institutional change in that body.

[43] Poole v. Vanlandingham, 1 Ill. (Breese) 47 (1822); Noble v. People, 1 Ill. (Breese) 54 (1822). These cases were subsequently overruled in part by, respectively, Stacker v. Hewitt, 2 Ill. (1 Scam.) 207 (1835) and Hroneck v. People, 24 N.E. 861 (Ill. 1890).

[44] Bowers v. Green, 2 Ill. (1 Scam.) 42 (1832), *overruled* Clark v. Ross, 1 Ill. (Breese) 334 (1830).

Ignoring the early years of the nineteenth century, where relatively small caseloads can account for the low case numbers in both categories, and the most recent period, where there has been insufficient time for many decisions of the period to be subsequently overturned, visual inspection suggests at least two changes in the rate of legal volatility. In the 1926-1950 period, there was less challenge by the court to its precedent, this trough in activity being possibly due, for instance, to a strong adherence to the norm of stare decisis, although such explanation would be preliminary.

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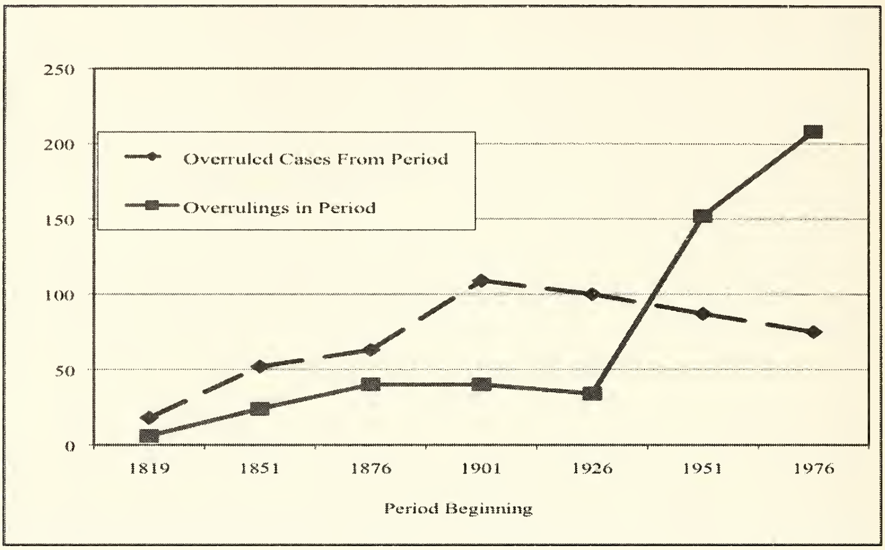
[45] But as Table 1 indicates, these other sources of failure appear to have increased; the components of this appear to be increased scrutiny of the ISC by the SCOTUS (particularly in the area of criminal procedure), increases in the activity of the legislature in passing statutes responsive to ISC decisions, and the ISC's own increased propensity to rehear cases.

[46] Calling this "legal volatility" passes by the fact that most cases simply disappear into the mass of legal literature. It is only a small subset of all 50,001 cases that are relied upon by overruling, and thus placed truly at risk of being overturned in an opinion. This inert body of law is largely irrelevant to the question of volatility, but the weight that should be accorded it as representative of an overarching "stability" is difficult to assess. For instance, if a court produces a thousand opinions in Year X and ten are overturned, should we necessarily say the law produced in X is "more stable" than the product of Year Y, when two hundred opinions were produced and five were overturned? How much more stable? In this way it might be thought that for periods with an extensive docket of uncontroversial cases and short adjudicatory opinions, the percentages reported in Table 1 tend to underestimate the amount of relative legal change.

Figure 1. Origin of Overruled Cases and Time of Overruling[47]



Beginning in the 1950s, the court began not only to overrule itself (its earlier incarnations, particularly) more often than it had in the past fifty years, but indeed at far greater frequency than it had ever done. It has remained significantly above the overruling numbers produced prior to 1950, years where caseloads were often considerably higher and thus "opportunities" for overruling might be thought to have been considerably greater. Remarkably enough, the first twenty-five years of the modern era saw 152 cases overruled; by comparison, the court had only overruled 144 such decisions in its previous 130 year history, and following this spike, there seems to have been a permanent elevation in the number of terminating cases.

There are two basic categories of explanation one could provide about changes in departures from precedent. Either there has been a change in the *nature of the precedent* with which the court is confronted, or there has been *a change in the*

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[47] Note that the first (1819-1850) and last (1976-2005) periods of time are thirty-two and thirty years in length—the other periods are twenty-five years in length.

court (or both). These alternatives can be expressed using the analogy of engineering failure or demographic mortality. To frame the discussion at this point, the increased rate of failure must be due to either: (1) *an intrinsic vulnerability* of the entity experiencing the hazard, so that some members of the population are more likely to fail (i.e., a bad batch of automobiles from a factory) and these are overrepresented during the time period where an apparent spike exists, (2) alternatively, the entity at risk of failure may be exposed to *a more dangerous extrinsic environment* during this period and therefore fail at a greater rate, despite having features that make it no more or less vulnerable than comparable entities entering service at earlier or later periods (e.g., transatlantic freighters before, during, and after World War II).

Put in more jurisprudential terms, it is to be expected that a court will have a base rate of overrulings to correct "errors" previously made; I mean by "errors" only that a later court will perceive them as such, regardless of whether or how they could be said to be erroneous in any objective sense. If the court in a certain period was particularly prone to making errors, meaning more vulnerable precedents, then the number of later corrected errors would be expected to increase, leading to a "spike" in overruling in the subsequent period, without any change in the stare decisis standards applied to precedents. Alternatively, one might suppose precedents have not changed in aggregate "quality," but the standards of stare decisis applied have been loosened which is one way of increasing the danger of a legal environment and creating a "spike" in overruling.

C. Age of Precedents Overturned

Considered as a group, failed cases had a median time to failure of 12.96 years. But this is not terribly informative, because failures *other than* overrulings are often part of the same controversy (including related habeas actions) and therefore have short failure times which are not likely to vary greatly over history. The median failure time for overrulings is 20.6 years, while other failures have a median failure time of only 1.59 years. That is, 50% of the overruled cases were over twenty years in age when they were terminated. Grouping all overruled cases conceals considerable and systematic variation in this, however.

Table 2. Time to Failure for Overruled Cases in Illinois

Lifespan	All Cases	Pre-1951 cases	Post-1950 cases	Pct (all)	Pct (<1951)	Pct (modern era)
less 5 yrs	92	42	50	17.49%	29.63%	11.81%
5-10 yrs	62	22	40	13.24	16.30	11.81
10-15 yrs	53	23	30	10.87	16.30	8.33
15-20 yrs	36	12	24	7.33	8.15	6.94
20-25 yrs	35	14	21	6.62	10.37	4.86
25-30 yrs	30	10	20	5.20	6.67	4.51
30-35 yrs	30	3	27	6.62	2.22	8.68
35-40yrs	20	3	17	4.02	2.22	4.86
40-45 yrs	21	8	13	4.73	2.96	5.56
45-50 yrs	19	2	17	4.02	1.48	5.21
50+ yrs	106	5	101	19.86%	3.70%	27.43%

As Table 2 shows, pre-1950 cases, if they were to be overruled, were overruled rather quickly, mostly within the first fifteen years of being issued, and only rarely would thirty-year-old or more precedents be overruled. More recent judicial practice not only indicates a continuing hazard to older precedent but actually suggests a relative reluctance to overrule recent decisions of the court; these effects are graphically illustrated in the second set of figures.[48] Nevertheless, a commonality between the "modern" and the earlier era is that risk appears to be greater in earlier years and gradually declines: the difference between the modern era and the earlier one is that for the modern court, the decline in risk by age is more gradual. Hazard analysis will build on and clarify this result.

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[48] The term "relative" refers to both past court practice, and to its propensity to overrule precedents of other age. This assessment, although it will be considerably refined, does create the same difficulty as in Padden, *supra* note 40. The post-1951 ISC overruled fewer recent precedents than did the pre-1951 ISC although the number of these at risk in any year was approximately the same. It is true that during the early years of the court's operation, the only precedents it *could* overturn were recent ones, because these were the only available. For instance "50 year old precedents" have only been "at hazard" since the 1870s in Illinois. In addition, as Table 1 notes, the court has varied substantially (although not in the last several decades) in the volume of its opinion production. These effects, as will be discussed *infra*, are likely too weak to account for the dramatic differences in Table 2.

Figure 2. Age of Precedents Overturned

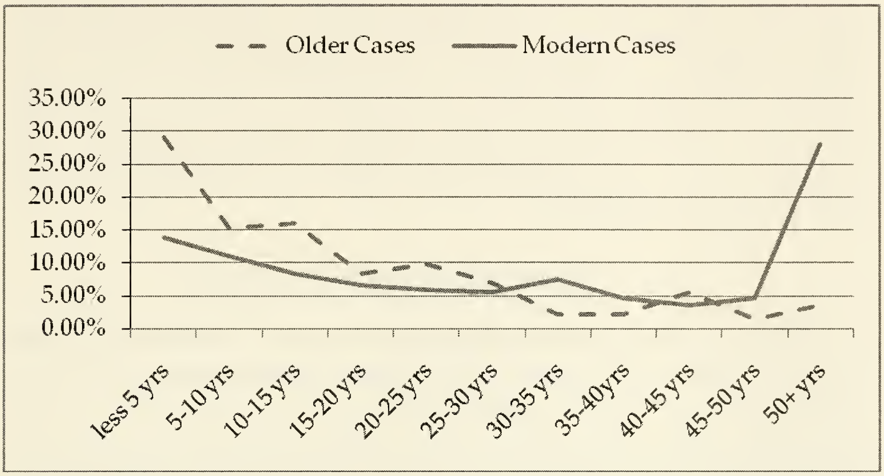

Figure 3. Median Age Increases Over Time

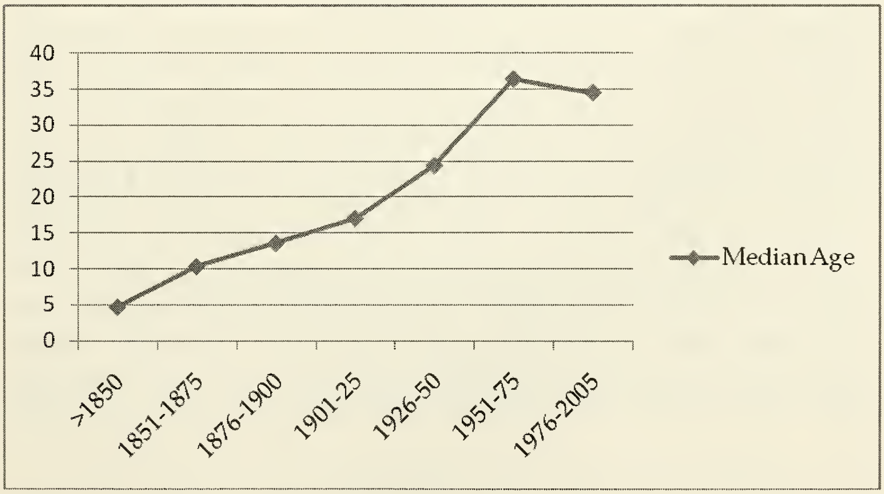

Figure 2 is derived directly from the table, while Figure 3 is a different way of summarizing the same information, by showing the median age of the ISC precedents overturned at different periods of its history. In the early years of the court, this was under five years, and it gradually rose as precedents reached older ages and remained at risk. The rate of increase, however, rapidly accelerated after 1950 from twenty-four to thirty-six years and then actually declined slightly. Increased age and increased rate of failure are conceptually linked by a hazard analysis. Although the overall failure rate of the post-WWII court would be slightly reduced by a reluctance to overrule very recent decisions, this effect would be greatly outweighed by an increased hazard applied to the much larger body of older precedents.

D. Age and Independent Variables

There are two broad types of independent variables in this study, based on the manner by which information on them is collected. First, there is simply the age of the precedent at any particular time. This information is numerical and is present at the time that the database is created. Second are categorical (0 or 1) "indicator" or "predictor" variables that tell us something institutionally or substantively about the case; specifically whether some feature, such as a dissent or a rule of a particular kind of law, is present or absent. The presence of constitutional, statutory, and procedural law was noted in order to examine whether these types of law were distinguishable in terms of legal change, as many commentators suggest they are (and/or should be). In addition, preliminary analysis of possible predictors identified two other important predictors—whether a case was issued with a dissent and whether it contained a rule of criminal law (including criminal procedure). These predictors remained important, as discussed below, even when controlled for the constitutional/statutory/procedural status. Needless to say, not all possible predictors were evaluated; the logic involved can be extended indefinitely to create a more or less precise typology of cases based on the types of law it addresses or the circumstances accompanying its issuance.[49]

Indicator variables, like failure or overruling, rely on the independent third-party coding created by Westlaw. Instead of retrieving the entire opinion output of a court, one retrieves a defined subset that has the indicator; for instance, one could get all opinions by Justice X, or in the case of dissents, all opinions with a dissent by anybody.[50] To create typological distinctions among cases, the easiest way is to search for a subset of opinions containing a particular Westlaw Key Number code, in this instance, the code that (with wildcards) will pick up all cases containing any constitutional, statutory, procedural,[51] or criminal law rule. These subsets are then processed by the software in the same way as described for a whole court database; the resulting subset database is then merged back into the data with a positive entry for the relevant indicator.[52]

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[49] There is a third type of variable, not used here, which would also be incorporated into the analysis, ultimately for completeness, namely, social, political and economic variables that define the broader context of an opinion. These would not be directly observable from the opinion itself, but if, for instance, one has a history of the political make-up of a court for each year, this could easily be merged into a database of the sort used here and then used as a predictor. One hypothesis would be that a precedent would be at increased hazard during periods of its existence where the court has a substantially different political complexion. A related hypothesis might be that certain kinds of court personnel (perhaps elected rather than appointed judges) produce "worse" opinions that are more likely to fail over time. This is a perfectly compatible approach to prediction of risk, but the current Article, given its methodological focus, omits this material in order for ease of presentation and concentrates on a kind of "engineering" interpretation of case risk based on intrinsic features it possesses. In doing so, I do not wish to give the impression that these are privileged as predictors—they are simply those whose collection and coding can be fully automated.

[50] This was done by adding to the jurisdictional search the limiting field DIS(dis!), which will pick up any opinion with a dissent containing a term "dis..."; that is, essentially all of them. Because of the nature of results returned, it appears that a certain number of dissents from an opinion—apparently where there are multiple separate dissents—can appear in the output. These duplicates were removed to avoid overestimating the number of dissents.

[51] Westlaw does not have a "procedural" key number – the code in this instance was generated by any cases retrieved by key numbers for pretrial procedure, trial, or evidence. Pretrial or trial here designates procedure in the civil context. Criminal procedure is captured in the coding for "criminal law".

[52] It is straightforward to assign a value of "0" for that variable if the case is not in the subset.

Table 3. Frequency of Selected Case Characteristics

	Dissents	Criminal	Procedural	Statutory	Constitutional	All Cases
>1850	32	43	148	22	37	1515
1851-1875	55	118	813	108	136	8626
1876-1900	289	328	1088	169	176	9680
1901-25	400	850	1491	567	607	11022
1926-50	238	1530	741	640	838	7133
1951-75	403	2075	398	462	945	5955
1976-2005	1308	1437	341	625	1001	6070
Total	2725	6381	5020	2593	3740	50001
Overruled	136	196	85	62	120	504
% Overruled	4.99%	3.07%	1.69%	2.39%	3.21%	1.01%

The "bottom line" of Table 3 indeed shows that cases with these codes are ultimately overruled at a higher rate. However, a very important caveat should be noted. Many cases, even at the Supreme Court level, have no Westlaw Key Number treatment at all. If there is a bias in this, a "coded" case is likely to be more important and more visible to later courts, and thus, more likely to be overturned and to be recorded as having been so. Thus, the relative rates of overturning are most meaningful when compared to one another, rather than the baseline rate, since *all* specific subsets may be somewhat elevated. With this noted, the importance of some variables is obvious. Nearly 5% of all cases issued with dissents have been rejected, and criminal law and constitutional law clearly appear to be more unstable than other types.[53]

The other important piece of information from Table 3 is the remarkable difference in the caseload of the court over time. Modern periods are characterized by a greater emphasis on constitutional and criminal law, relative to procedural questions. Particularly, in the most recent batch of cases, the number of dissents has radically increased. This leads to an immediate question of whether the apparent recent increase in the number of overrulings could be driven by the *type of cases* the court has before it, or alternatively, whether the apparent increased risk is a consequence of external pressures for legal change, a weakened doctrine of stare decisis, or perhaps the fact that the recent precedents most likely to be examined are dissent-laden and contentious, and thus less stable.

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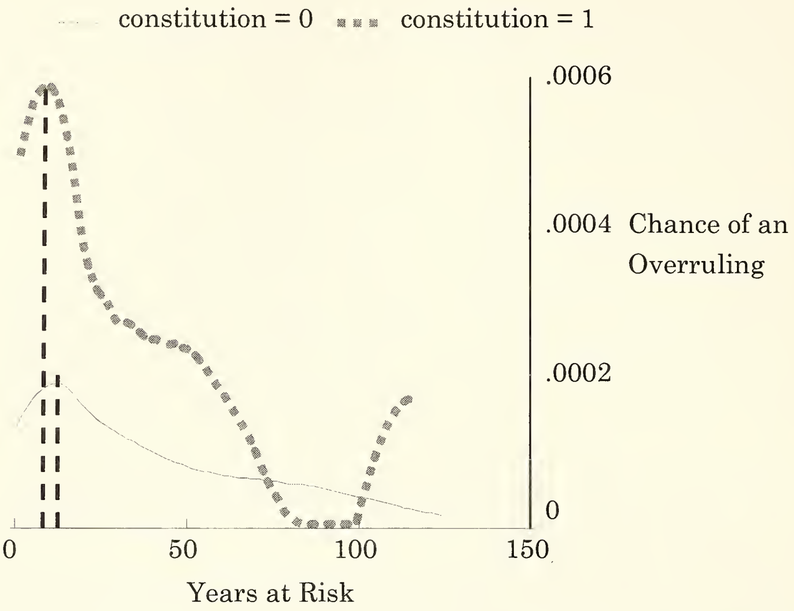
[53] Of course, cases may have multiple indicator variables; for instance, many due process cases in the modern era have a positive code for criminal and constitutional law.

It is precisely to tease apart such questions that hazard analysis is useful and, indeed, perhaps necessary. By such methods, we can identify the risk experienced by, for example, a constitutional precedent relative to the number of constitutional precedents in the population of the same age. Thus, although more constitutional opinions in Time X will lead to more constitutional overrulings in Time X+1, we can automatically control for this. At the same time, we can surmise from Table 2 that the risk to any type of precedent is unlikely to remain the same as it ages, and it may be important whether a particular predictor has equivalent effects throughout a precedent's lifespan or only affects certain ages.

Figure 4 shows the result of one such univariate hazard analysis that separates ISC case law into those cases articulating a constitutional rule (7.5% of the population) and those that do not (92.5%). It then traces the per-year risk of constitutional and non-constitutional law. For both case types, the pattern of risk is broadly similar: a period of increasing risk, followed by a long decline. For non-constitutional cases, risk peaks at about 0.02% per year of an overruling. By contrast, constitutional cases reach a peak level of risk earlier, and at three times the rate, 0.06% per year. The relative triple risk parallels the standard hazard until about age fifty, then falls to the same low level (the final increase after age one hundred for constitutional cases is driven by a small number of cases).

Figure 4. Hazard of Constitutional and Non-Constitutional Law



How are we to interpret Figure 4 consistent with the entire population of precedents? Roughly speaking, 1% of non-constitutional precedents will be overturned; a somewhat higher percentage will fail in some other way. This is 1% *eventually* – the area under the bottom curve traced in Figure 4 approaches this number as an asymptote, as time stretches out indefinitely. We can therefore interpret the fate of an individual precedent (knowing nothing else about it) in the following way—after approximately twenty years there is one-half percent hazard of the precedent being overturned, and a declining per-year hazard after that point which will converge on a sum of an additional half-percent of overturning in the indefinite future.

Around this interpretation of the overall pattern of precedent in a jurisdiction, we can proceed to add predictors that change either the ultimate asymptotic hazard of overturning a precedent with particular characteristics, or the time pattern of that hazard. For constitutional precedents for instance, the area under the *top* curve in Figure 4 is roughly 3%, to reflect the elevated risk that occurs to such precedents, at least in the first seventy-five years or so of their existence. Constitutional precedents, as generally believed, show—at first approximation—a greater readiness to change. The figures below, 5-8, complete the basic presentation of the predictors and their relationship to hazard over time.

The pattern for statutory law (Figure 5) is similar to that for constitutional law but at a lower level of hazard. One notable difference, however, is that peak risk occurs later than the population as a whole, perhaps suggesting a willingness by the court to give a greater amount of time for the legislative process to act on statutory questions before re-evaluating their past interpretations. This would provide support empirically for one aspect of normative interpretations of the proper scope of interbranch relations, but not for others.[54] Although statutory cases do not show a stronger resistance to change than ordinary ones, they are stable relative to constitutional questions, and even if the ultimate rate of overrulings is largely equivalent, the time pattern could show the presence of a certain amount of deference to the legislature not present in constitutional cases.

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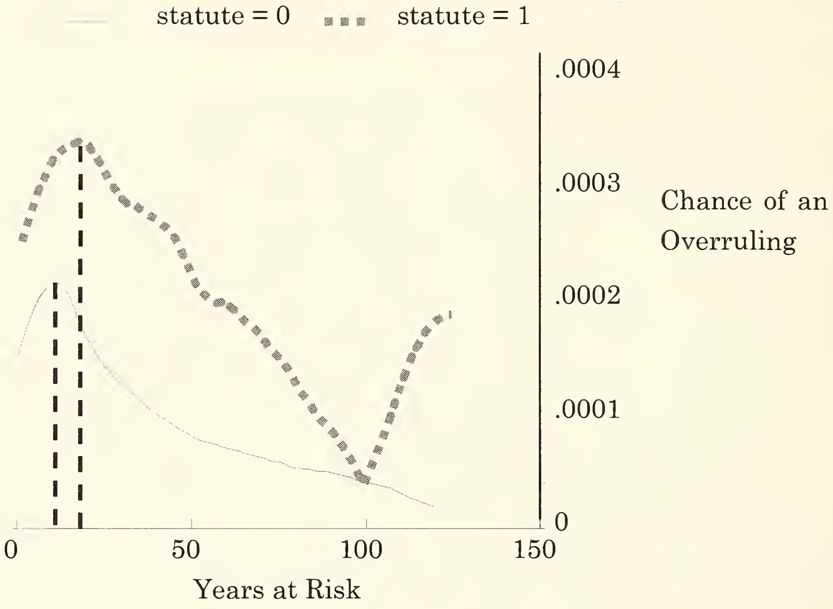
[54] *See, e.g.,* Hathaway, *supra* note 9, at 657.

Figure 5. Hazard of Statutory Law



Procedural law cases, although showing elevated risk in later years, are largely indistinguishable in their initial pattern from the population. Indeed they appear to be at slightly lower risk than nonprocedural cases. This appears to be in conflict with some theoretical expectations that courts should feel relatively free to vary their internal rules given the relative lack of external reliance.[55] However, the manner in which these cases were coded may have affected this result in two ways. First, as noted briefly, the "procedural" designation does not include criminal procedure (coded as "criminal"), and some of the principal arguments for weakness of stare decisis arose in the context of *criminal* procedure.[56] It may well be that, at least behaviorally, this distinction is an important one, and the two types of "procedure" should not be expected to demonstrate similar dynamics.

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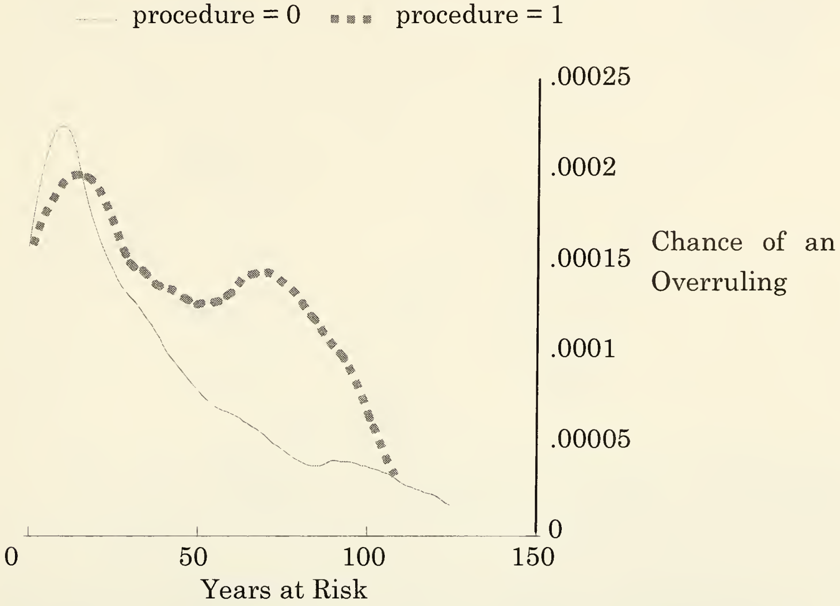
[55] *See* Lee, *supra* note 11, at 704 (claiming that rather than adopting a looser standard toward constitutional law, SCOTUS overruling behavior "could be justified under the notion that 'rules of procedure' are of diminished precedential value"). Since, in this population, constitutional precedents are more quickly and more often overturned, but procedural ones are, at least for an extended time, more slowly and less often overturned, it is difficult to support a "loose standard for procedure" as a dominant explanation.

Figure 6. Hazard of Procedural Law



Criminal law, by contrast, although not generally discussed as a distinct body of law calling for a different norm of stare decisis, includes criminal procedure and shows a much stronger effect empirically in Figure 7. As Table 3 shows, however, the ISC has varied greatly over time in the number of criminal cases it takes. While criminal cases were less than 5% of the docket in the nineteenth century, their relative importance rose rapidly (8% in the first quarter of the twentieth century, 21% in the second quarter, peaking at nearly 35% of its docket in the 1951-1975 period) before falling back in the final period under study (24% in the 1976-2005 period).

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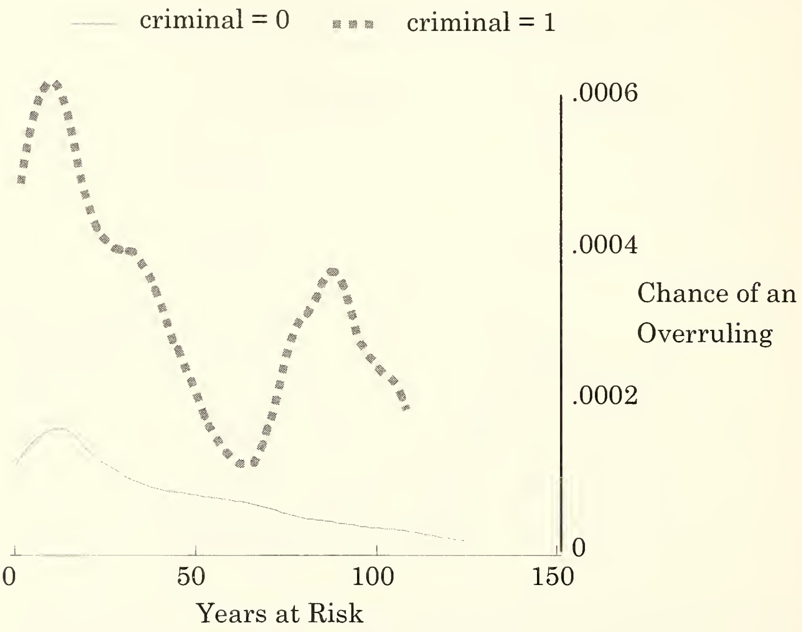
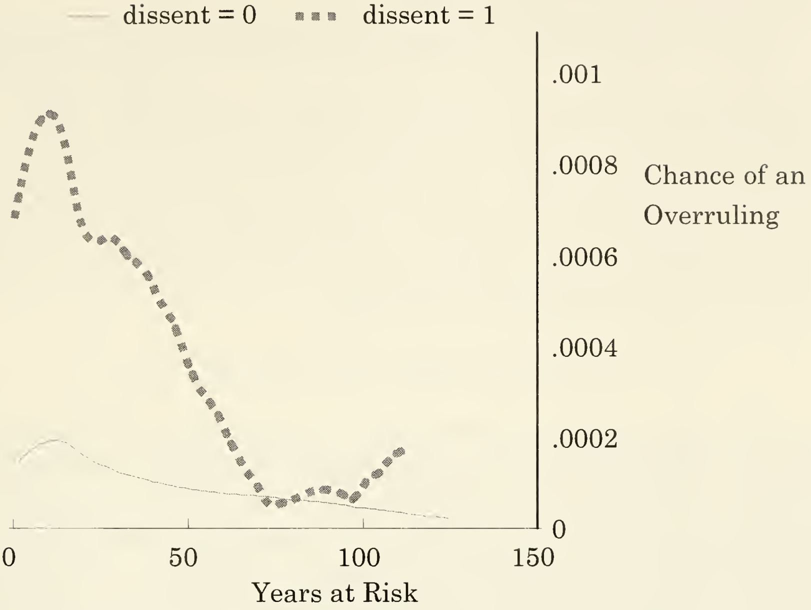
[56] Payne v. Tennessee, 501 U.S. 808, 828 (1991).

Figure 7. Hazard of Criminal Law



This increase in cases at risk is surely partly, but perhaps not entirely responsible for the even more dramatic variation in the number of *overrulings* in the criminal area. There were only three such events in the period up through 1925, followed by thirteen in the next twenty-five years, jumping to sixty-one from the peak period of criminal law *activity* after 1950, and nearly doubling again to 119 in the subsequent and final period. Therefore, even as a tentative conclusion, one could only say that a de facto increase in legal instability can only be shown to be a phenomenon of the twentieth century, when there is also greater judicial interest in this area.

Figure 8. Hazard of Dissenting Opinions



The final predictor variable examined here, in Figure 8, is the presence or absence of a dissent. This shows at its peak, a rate roughly five times that of a case issued without a dissent. Unlike risks to criminal law, there seems to be a more stable pattern to the effect of dissent on later overruling. Although both dissents and overruling have risen substantially over time, cases with dissents have constituted a substantial portion of the overruling events even in the nineteenth century. There were forty overrulings in both 1876-1900 and 1901-1925 (as shown in Figure 1, *supra*). Of these, 3/40 and 6/40 involved cases drawn from the relatively small proportion (roughly 3%) of early opinions issued with dissents. This suggests the hazard analysis has detected a genuine phenomenon, at least in the sense that dissent is consistently a risk factor to a precedent going forward. This relative risk, of course, might vary with time. Below I suggest that the massive contemporary increase in dissents (nearly half of all dissents have been issued in the last thirty years) may have had some effect in lessening the effect of any particular dissent on the future fate of the principal opinion, although probably increasing the overall contribution of dissent to legal change.

In the next section, I discuss the statistical model combining these predictors and assessing their statistical strength when all variables are included. I consider further how the patterns and risks they create, along with the overall level of hazard to precedent, has varied historically, with particular attention to whether the increase in overrulings shown in Figure 1 is more likely attributable to characteristics of the cases at risk or, alternatively, to some "environmental" feature of the historical period doing the overruling.

II. MODELING THE FATE OF PRECEDENT

To increase the precision with which we can estimate the effects of the independent variables on adherence to precedent, we can use a variety of regression models, usually known as Cox proportional hazard regressions, which are well-known in epidemiology and increasingly employed in social science generally.[57] These models provide a quantitative interpretation of the hazard experienced through time, or conversely, the survival through these hazards.[58] In the biological analogy, precedents are born when the opinion is issued and last for a certain period, "dying" when they are rejected and are no longer normatively authoritative.[59] Engineers use essentially the same method to examine the time to failure of a component or product. Variation in the rate of legal change is therefore reconceived as a general increase or decrease in the hazard experienced by the existing stock of legal norms during a certain period of time.

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[57] *See generally* Raymond E. Wright, *Survival Analysis*, *in* READING AND UNDERSTANDING MORE MULTIVARIATE STATISTICS ch. 11. (Laurence G. Grimm & Paul R. Yarnold, eds., 2000).

[58] As suggested in the Introduction, the use of such models is complicated because Illinois Supreme Court cases are distinct in certain ways from biological samples. Court cases are issued in the thousands but die only in the dozens, yielding a continuously expanding population of potential norms to bedevil the public and practitioner. The "mortality" of such a population is very low, although the variation in it remains the relevant variable here as the measure of legal volatility. Moreover, most cases reach another end by fading away rather than burning out, and although this disappearance could also be measured, it would lead us away from the principle of adherence to precedent to the separate question of the *choice* of precedent.

[59] A more complicated model, beyond the scope here, could extend this analogy by using non-overruling but negative cases as "health insults" that make the precedent

More importantly, regression models allow the simultaneous estimation of multiple predictor variables, which helps to control for the correlations that exist among them, and allows an assessment of the genuinely independent effect of each predictor. For the five predictors discussed in the last section, the result of Cox regression modeling is summarized in Table 4.

Table 4. Relative Hazard Effects of Selected Predictors

Predictor	Relative Risk	Std. Err	z	P-value	95% Conf.	Interval
Dissent	3.624846	.4626789	10.09	0.000	2.822548	4.655194
Criminal	3.680792	.380807	12.60	0.000	3.00523	4.508217
Procedural	1.834991	.2415489	4.61	0.000	1.417705	2.375099
Statutory	1.609376	.2742628	2.79	0.005	1.15239	2.247582
Constitutional	1.930049	.2685674	4.73	0.000	1.469343	2.535207

The multivariate regression in Table 4 shows all the predictors in the study to have high statistical significance when considered together,[60] and a case with any of these features would be predicted to have a higher level of risk than a randomly drawn Illinois Supreme Court case without such features. Again, there is an indefinite number of such predictors, and there was no attempt here at a global evaluation of these (for instance, by testing each of the KeyCite categories in Westlaw and estimating their relative strength as risk predictors). The relative risk or relative hazard of the predictors is in the first data column of the table and confidence range in the last

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"sick" and then estimate the conditional mortality from such cases that have "lost their vitality."

[60] The regression model was developed by the forward stepwise inclusion of variables, starting with the best performing univariate predictor (dissent) and adding the next best performing one, and so forth.

two columns. For instance, constitutional cases in the multivariate model show a slightly less than double (1.93) risk of being overruled as they age. The closer this number comes to one, the greater similarity this category of cases has to the population as a whole. If the number was to fall significantly below one, it would indicate the case characteristic is a "protective factor." All of the variables above are, by contrast, "risk factors."

Of the predictors tested, the order of relative strength of the "structural" (constitutional/statutory/procedural) characteristics is in accord with theoretical expectations, with the constitutional and procedural cases both showing a greater level of instability than statutory ones. The lower bound of the confidence interval is barely different (1.15) from one. When all "failures" – including such events as reversal of an Illinois Supreme Court opinion at the level of the SCOTUS – are included in the analysis, this difference between statutory and constitutional law becomes stronger. The relative risk to statutory cases becomes 1.30 and ceases to be statistically significant, while the relative risk to constitutional cases rises slightly to 2.06.[61]

The actual prediction of the theoretical literature would have the statutory case characteristic be a protective factor, with relative risk < 1, relative to common law precedents. However, as mentioned above, the nature of the coding does not distinguish the "importance" or "visibility" of cases to later courts, which might be positively related to risk,[62] and could well be correlated with statutory status in comparison with cases that reference neither statute nor constitution. Therefore, any conclusion about the relative hazards between statutory law cases and common law cases should be approached with additional caution. There is no obvious reason, though, why constitutional cases (which are mainly state constitutional matters in this population) should necessarily have greater visibility risk than statutory interpretations, so at least tentative support can be found for a numerical result that is in the predicted direction for a constitutional/statutory risk comparison. Or, to be more precise about interpreting these results, if these numbers are roughly correct, it seems that there is a behavioral pattern by the Illinois judiciary that corresponds to the normative or theoretical account of stare decisis in which constitutional precedents should be more readily subject to change than are statutory ones.[63]

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[61] The all-failure relative risk falls for criminal and procedural cases (2.81 and 1.41) but remains significant. The effect of a dissent increases to a risk multiple of 4.23.

[62] It may be possible to assess this by developing a measure based on the number (or more crudely, presence/absence) of later citations, but the practical difficulty of doing this for all 50,001 cases has been left to later research.

Statutory, procedural, or constitutional predictors are, in this analysis, overshadowed in effect by the presence of a dissent or a rule of criminal law. This latter predictor, though, contains rules of criminal procedure and thus overlaps considerably with what some courts mean by "procedure." It was originally chosen as a basic control variable marking the most central cleavage in American law, between the civil and criminal set of cases. This distinction, taken alone, indicates that cases on the criminal side have an overruling risk 3.68 times as high as a comparable civil case. Dissents create roughly the same level of increased risk, a 3.62 multiple, for cases to which they are attached. Because of the importance of these variables to this population, and the relative inattention given to them in the theoretical literature, they warrant a somewhat fuller discussion.

A. The Presence of a Dissent

One obvious source or indicator of a flawed opinion is its accompaniment by a dissenting opinion. This can be likened to a product flaw or, if one prefers, a warning label on the majority opinion, indicating it has failed the quality test of at least one inspector—the dissenting judge or judges. With this hypothesis in mind, I collected all dissents from the database, 2725 of them from 1819 through 2005. These dissents were downloaded and separated into records and then compared with the records of "failed cases." One hundred thirty-six cases issued with dissent also were opinions listed as having been terminated. Ninety-one are indicated as having been overruled. This produces an overall rate of failure of 5%: more than three times the failure rate of all opinions. This is certainly a strong indicator that although dissents do not mark the majority of failing cases, they nevertheless are disproportionately represented, a result which is unsurprising, but which hazard analysis allows us to quantify.

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[63] *See* William S. Consovy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson, *and the Consequences of Pragmatic Adjudication,* 2002 UTAH L. REV. 53, 64 (2002) ("Although there are several rationales for the Supreme Court's desire to adhere to principles of stare decisis, the force with which those desires apply varies between statutory and constitutional adjudication.").

An important feature of dissents in this study is that they change during the history of the ISC. The timing of this change, however, does not correspond directly to the time pattern of increased overruling discussed above. The number of opinions issued with dissent was actually relatively stable in the twentieth century until about 1975, starting at 2.99%, rising to 3.63%, and then falling back down to 3.34%. It increased rapidly in the period after 1975 and has continued to remain above its historical level in the ensuing decades, constituting 6.77% of all opinions. This is an interesting phenomenon standing alone, although its causes are beyond the scope of the study. The higher chronic rate of dissent in the last period (the "contemporary" court) does appear to contribute to an ongoing increased background rate of change. But since the increase in overruling began around 1950 in the midst of a long stability in the rate of dissents, it is difficult to tie the initial increase in overruling to a change in the number of weak (or "weakened") opinions at risk. Rather, as will be discussed below, there seem to be independent effects of period.

As a comparison, an even more substantial portion of the decisions from the United States Supreme Court contain dissents. In a quick survey using the same search methodology I applied to the state court, I identified a total of 5236 decisions in the SCOTUS database of 20,564 total decisions.[64] Here, too, dissent appears to be related to higher risk of failure, but the magnitude of effect (and thus its predictive value for failure) is weaker. In Banks's temporally limited study of SCOTUS precedent, two-thirds of the overturned precedents contained dissents, whereas the background rate for all precedents is more like one-quarter. However, considering relatively recent decisions only (during and not greatly prior to the period of the Banks study and thus presumably the ones under hazard), 3928/7002 or 56% started out with dissents. The effect of dissent on overturning is still in the predicted direction since dissents are attached to 66% of the overturned, but this 10% "enrichment" is much less impressive.[65] The influence of dissent standing alone is not therefore likely to be terribly strong in the contemporary SCOTUS—it simply comes with the territory of decisions likely to establish an important principle of law and creates an additional concern about the comparability of the SCOTUS to state supreme courts tied to the common law.

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[64] These cases were retrieved using the Supreme Court database from Westlaw, broken down into periods because of retrieval restrictions, and excluding all "mem" (memorandum) cases. To retrieve dissents from among this group, I just added to the search the dissent ("DIS") field to see if the cases contained a dissent, as in DIS(DISSEN!). This collection occurred as of 2006.

In common law courts, the relationship between dissenting and failure appears direct and understandable, in that it either marks an opinion as weak or exposes it to attack. However, its relationship to legal change involves two main mechanisms. Returning to the study population in Illinois, of the 136 opinions issued with a dissent that are ultimately terminated, many of them were eliminated by institutions *other than* the issuing court. It is still true that dissenting opinions are more common than random chance would expect among overruled cases. However, a larger number of failures related to dissent are due to reversals issued by the SCOTUS (or in criminal cases, grants of habeas corpus by other federal courts). Moreover, by far the majority of legal change (overturned precedents) occurs on cases that were not visibly "defective" upon issuance.

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[65] Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 241-42 & tbl.4 (1999). The actual ten years in which Banks inspected overruling produced 1220 opinions, 726 of which were issued with a dissenting opinion (or 60%), an even closer percentage.

Looked at from the perspective of 1950, 144 cases had been overruled by this point, and fourteen of those had been cases with dissent (10% of overruled cases, as opposed to 3%, roughly of all cases). After 1950, 360 more cases will be overruled, and sixty-three (17.5%) of these will be cases with dissent. Hence, as a rough estimate, we could guess that some number (twenty-five to thirty) of the 360 could be due to either the greater number of dissents (especially in the most recent period) and/or a greater hostility to past precedent issued with dissent. However, either phenomenon is unlikely to explain the bulk of overruling activity.

B. Opining On Criminal Law

Another possible source of increased relative risk would be based on the different substantive areas of the law addressed by the case, because it is plausible, and probably most lawyers assume, that different areas of the law are more or less prone to instability. Certainly, this is true as to legal changes in a specific area of the law that come into fashion and move across the country, for instance the move away from contributory negligence in tort law. It is also possible that certain areas of the law might be more inherently unstable or unsettled, in which case they might show persistently higher rates of being overturned. One such pattern is assessed in Figure 7 above.

Figure 7 reflects a subpopulation of opinions I will call "criminal law rules" collected using the methodology discussed in Part I in order to produce 6381 cases matching the relevant criteria.[66] Cases of this type are more vulnerable: 196 of these 6460 cases failed, 146 of them by overruling. As with dissents, this is triple the failure rate (3%) of the population as a whole (1%), as a crude calculation, and even more than triple when the risk is calculated using a Cox regression.

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[66] The search for this on Westlaw is "k110(wildcard character)." Essentially this means that a key number or headnote in criminal law is presented with the case. This search does not produce all criminal cases because not all of them have been coded for this, but it does tend to capture cases that might serve as future precedents for the criminal law propositions enunciated in the headnote and, consequently, identifies the cases likely to be at risk from any instability in the criminal law.

Also as with dissents, the pattern of the court's criminal caseload does not indicate that an overrepresentation of criminal law rules at risk can be *entirely* responsible for the post-1950 period of instability. Although criminal law activity did begin to rise in the Illinois courts during the 1920s and 30s (no surprise to devotees of gangster history), it fell back again in the subsequent decade and rose again to an extreme level of activity during the period 1960-1969. It has since declined as a proportion of the docket of the court. If the intrinsic weakness of criminal opinions were the *entire* basis for the velocity of legal change, we would expect these patterns to show the opposite direction—a spike of criminal law *preceding* an instability spike.

The modern era generally shows a particularly high risk for criminal law precedents. Looking at events up through 1950, only thirteen criminal law cases (out of 144) had been overruled, or 9% of the total. After 1950, a much larger proportion of the cases overruled during this time, 133 out 360, or 37%, were criminal law cases. The difference between 37% and 9% amounts to about one hundred extra cases, due either to the larger number of criminal cases at risk or to a weakened adherence to precedent with regard to criminal cases. For the reasons discussed, it is unlikely that, considered alone, the larger number of criminal cases in the system can account for this. This additional number of overruled cases constitutes a major proportion of the additional overruling in the modern era, and a further attempt to investigate the statistical consequences of this is explored below.

C. Changes in Hazard Due to Period of Issue

Since the above discussion has strongly suggested that there have been historical changes in adherence to precedent, and it is unlikely that these can be fully accounted for simply by a change in case characteristics, it is necessary to adjust the model to try to understand why these have occurred. As discussed above, it is possible to consider opinions as being similar to batches of vehicles issued in a "model year," which might vary in quality and thereby be a basis for greater hazard of failure. Given the limitations of the data, these model years are limited to generation-long periods of court history and are thus of limited utility in identifying the basis for what (or often, who) makes an opinion a stable and valuable precedent. It is apparent from the above, however, that significant alterations have taken place in the way precedent was treated, and therefore period effects were included in the regression model.

Table 5. Period of Issue Risk Factors for Overruling in Cox Regression

RISK FACTOR	Relative Risk	Std. Err	P-value
Opinion Issued ***1926-1950***	1.71	.297	.002
Opinion Issued ***1951-1975***	1.83	.348	.001
Opinion Issued ***After 1975***	2.17	.479	>.001

Put simply, the results summarized in Table 5 indicate the latter half of the body of precedent is at about double the risk of being overruled, even when controlling for the increased hazards of dissents and criminal law opinions, both of which have increased at different parts of these periods. Of course, simply because of the way hazards change with age, recent precedents are at greater risk right now, but what the hazard model indicates is more than this. It indicates that precedents from recent periods are at greater hazard during their first twenty years of existence than precedents written in the past were during *their* first twenty years on the books.

Again, this could be due to something having to do with *them* (the implicit assumption of this type of regression) or something to do with the period in which they experience most of their risk. If a period of issue shows elevated hazard throughout its subsequent history of treatment by the court, we can put the "responsibility" on the issuing judges, perhaps. However, if the elevated risk attributable to the period arises from one subsequent period, and this subsequent period *also* increases the risk for other precedents, it is the latter "risky" period that is "at fault" rather than the earlier, putatively defective issuing period.

This is measurable and important in the hazard analysis context because it is connected with a fundamental assumption of much regression estimation of the relative risk, that the increased hazard be *proportional* across the period of observation. A risk multiplier is effectively a rate (risk per unit time); in order to produce a *single* rate of increased hazard, one must assume the risk factor exerts a similar effect over the entire period of observation of the population.[67] In this analysis, it assumes that something like a dissent approximately triples the risk of being overruled during the seventh decade of a precedent's lifespan and equally triples the risk during the first decade. To the extent this assumption is violated, one must look to the locus in the lifespan of the increased hazard rather than just a generalized relative hazard.

In this exploratory study, I have not emphasized this important concern, but non-proportional hazard is especially relevant to understanding the meaning of a period effect on overruling. If a risk factor is based on some intrinsic weakness—like being issued with a dissent—we would expect that the proportional hazard assumption will be valid (as it turns out to be roughly for the dissent risk). On the other hand, if, for a "batch" of opinions, the increased hazard they experience is due to an elevation of risk at a particular future point in their lifespan, it is in some feature of this period of risk that one might search for the source of the hazard. We may also find that a period of risk does more than just elevate the strength of all risk factors and the baseline risk but also particularly affects certain risk factors (as I have already suggested may be the case with criminal law).

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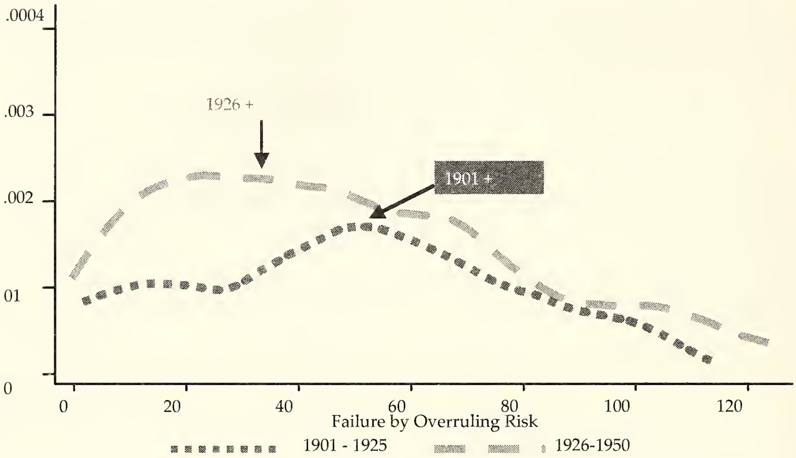
[67] For extended treatment, *see* HOSMER & LEMESHOW, *supra* note 8, at 206.

Figure 9 . Hazard Patterns for "Model Years" As They Age



One way to get at this issue quantitatively is to trace per/year hazards experienced by each "batch" or "model year" of precedents. This is done in Figure 9 for two periods, which show quite different shapes from the "standard" quick increase in the teen years and steady descent thereafter. Cases issued during the period 1901-1925 show an area of maximum hazard in the form of a "bump," thirty to sixty years out from the time the opinion comes down. That is, this risk starts approximately when the last opinions from this period enter the modern era. The period 1926-1950 shows a standard pattern at the beginning, but instead of declining after about ten years, its hazard is flat for thirty more years. Both of these patterns are relatively easily explained by assuming that precedents started to experience increased and sustained risks as the modern era began.

We can also observe the interaction between period and particular risk factors. Overall, the *relative risk* of eventually being overturned (the multiplicative factor) associated with dissent, is 3.62. The multiple has remained roughly similar across eras; that is to say, the relative effect a dissent, per se, has on the attitude of a later court is broadly consistent—it triples the risk that the precedent will be overturned. If we instead stratify the sample to look at precedents issued in different periods, the results are consistent for most periods: 1.45 before 1875, 3.440 (1876-1901), 3.68 (1901-1925), 3.31 (1926-1950), 4.09 (1951-1975), and 1.61 after 1975.

The small number of relevant events (opinions with dissents that were overturned) from the early nineteenth century makes it more difficult to assess this anomaly, but the reduction in relative risk in the most recent generation is of interest. Recalling from Table 3 that there has been a dramatic and sustained rise in opinions issued with dissents, one plausible hypothesis is that the presence of a dissent is now less meaningful in an informational sense, and this connects to the later hazards it experiences. That is, one could argue that until the most recent generation, dissents accompanied only truly awful results from the perspective of the dissenting judge, whose attitude could be correlated with those of later like-minded jurists. A dissent therefore was a sort of "red flag"[68] to later generations of a bad or potentially bad case. If dissents are issued more freely, this signaling function declines, and the effect of the mere presence of a dissent will be diluted.[69]

It would be useful to know whether these effects are truly due to their marking intrinsic weakness or whether they are simply correlated with extrinsic hazards (the presence of which we are prone to expect by the statistical spike in overruling post 1950). Dissents appear to be a genuine marker of structural weakness because there is a constantly increased effect, which, as mentioned, is tied to reversals as well as to overruling. To the extent a dissenting judge realizes this additional hazard can be instantiated, dissents can serve a strategic function.[70] However, this also might create a strategic dilemma, which may be apparent both in the SCOTUS and in the recent era of the ISC, in that if all or most opinions come with dissents, they will not identify any subset of particularly bad court opinions.

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[68] This term here has its common meaning rather than—or in addition to—its Westlaw sense.

[69] If this account is right, it also might provide insight into the low effect during the earliest period as well, because if "too few" dissents are issued, this also will fail to mark out bad cases and dilute both the signaling effect and the related relative hazard.

[70] *Cf.* Cross, *supra* note 29, at 305-06 (discussing his claim that dissents are inconsistent with the legal realist model). In the current model, dissents clearly weaken the future stability of the precedent. Although Cross seems to be arguing that no such weakening is necessary in the pure realist model because a court can get rid of whatever precedents get in its way, a more complicated recursive model might recognize that courts and the public would put less faith in a vulnerable precedent, thereby providing

By contrast, once the post-1950 events are included, it becomes clear that criminal cases are now at higher risk and that this risk has accelerated in the last generation. The risk multiplier for overruling, including all data, is 3.68 and for precedents issued in the six periods is 3.75, 6.51, 1.96, 1.67, 1.88, and 5.79 for opinions issued in the last thirty years. Precedents, no matter when issued, are now at significantly elevated hazard. Because the number of overruled decisions emanating from the nineteenth century is low though, it is the last period that is driving much of the elevated risk. In addition, post-1950 courts have also reached back in the past to overrule a number of early decisions, accounting for the second spike in a graph of the hazard to criminal opinions in Figure 7.

What has probably occurred in this instance is tied to the nature of the increase in earlier criminal opinions, which nobody will be surprised to learn was driven by increasing ISC attention to criminal procedure, which in turn was a reflection at the state level of the contemporaneous "constitutionalization of criminal procedure" in the Supreme Court of the United States. The period when this transformation occurred has been dated as beginning in 1961 and continuing "[v]igorously for the next ten years, and moderately for another ten."[71] Primarily under the authority of the Fourteenth Amendment's Due Process Clause and often procedurally implemented through

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it less insulation on reliance grounds. Moreover, a dissent is an invitation for litigants to attack a precedent, thereby increasing the *number of occasions* on which it is exposed to a significant hazard of overruling by "opportunistic" judges and presumably decreasing its expected lifespan. *Cf.* Banks, *supra* note 65, at 241 ("The more dissension in a case cannot help but signal to prospective litigants and courts that a disfavored precedent is on weak footing and ripe for an aggressive challenge in court.") Hence, it is *plausible* to suppose that dissents are explicable on purely interest-based grounds since they probabilistically sabotage an unwanted legal result; they may, of course, serve other purposes instead or as well—the point is that they should not be considered an anomaly validating one view or the other of the legal process.

[71] Gerald G. Ashdown, *Drugs, Ideology, and the Deconstitutionalization of Criminal Procedure,* 95 W. VA. L. REV. 1, 2 (1992).

federal habeas review of state criminal convictions, this area of the law was fundamentally transformed by a fairly detailed regulatory scheme designed to achieve "uniform protection throughout the states for the individual rights of criminal defendants."[72] What the period interaction suggests is that although this task increased the level of activity, the state-level precedents generated during this time were not at particularly high levels of risk.

The high level of risk, and the driver for the overall level of criminal law as a risk factor, began only in the final period. One hypothesis might be that state supreme courts, once they had initially absorbed the legal trend to constitutionalization, however, were faced with at least two subsequent issues: how to fit specific factual circumstances into this complex regulatory scheme and the increased politicization of the law of criminal procedure. It is a reasonable hypothesis that the greater complexity which was inherited from the sixties led to greater inter-court (and probably intracourt, as evidenced by dissents) disagreement about the proper subsidiary rules. The precedents from the sixties themselves were immunized by being tied into the commands of the SCOTUS, but later ISC courts would vary in attempting to cabin or expand them, thus accounting for enhanced overruling. In addition, it is also likely that because an elected partisan judiciary (as is the situation in Illinois) ran for office on resistance or acceptance of the Warren Court's approach to crime, a narrow or broad interpretation of the panoply of new procedural rights was likely to vary by the varying political composition of the ISC.

Further research could identify the relative contributions of these effects or perhaps identify other causal routes.[73] The immediate insight suggested by this analysis is that two factors have potentially been identified as marking out an *intrinsically* unstable area of law. First, we may hypothesize greater instability if the area of law is highly complex (particularly perhaps if many rules are based around discretionary standards such as "reasonableness" or "fairness). Second, we might expect greater instability if an area of law is politically contentious, at least if there is considerable political competition in the state and specifically its judiciary. Criminal law was not always like this, but a parsimonious explanation of the data would suggest that it has been remade along these lines.

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[72] *Id.* at 4-5.

[73] Another possible source of instability is that the constitutionalization of criminal procedure has produced a cascade effect in which both legislatures and courts are encouraged to pass more laws. "Countermajoritarian criminal procedure tends to encourage legislatures to pass overbroad criminal statutes and to underfund defense counsel. These actions in turn tend to mask the costs of procedural rules, thereby encouraging courts to make more such rules. That raises legislatures' incentive to overcriminalize and underfund. So the circle goes." William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 54-55 (1997). Modern

The tentative conclusion from Figure 9 would be that the overall increased risk for precedents from the first half of the twentieth century is due primarily to the increased scrutiny with which they were viewed by the second half of the twentieth century. This clearly was present in the 1951-1975 period but appears to have been sustained by a rise in vulnerable dissents and an increased instability in criminal law in the subsequent period. Since it is logical to assume that courts treat precedents similarly (except perhaps for ones that they themselves have authored), the most consistent explanation is that there is nothing particularly "weak" about each era's opinions, and the elevation in risk for the later periods is also "extrinsic." The environment for precedent has become more dangerous with time.

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criminal law is institutionally complex involving interactions among the federal judiciary, the state judiciary, and the state and federal legislatures. This makes a full analysis of legal change and "vulnerability" difficult in this area and highlights a limitation of the current approach generally. To the extent the SCOTUS acts on a past state rule, it is no longer available for the ISC to overturn, and this occurred numerous times in Illinois during the late twentieth century. Likewise, Congress or the state legislature may act. Statisticians refer to this issue as one of "competing risks." *See* SINGER & WILLETT, *supra* note 7, at 586-88. The actions of these "competing" institutions is reflected in the overall "failure" rate for criminal law rules, but if these institutions had not existed or not been as interested in Illinois criminal law, would the ISC have eventually acted? This would mean, briefly, that the relative vulnerability of criminal rules to overruling is understated by looking at what actually occurred within the ISC. A competing risk model that involves multiple sources of authority and legal change is an obvious extension of the current research.

D. Effects of Period of Risk

Measuring the effect of a historically risky period is statistically challenging. It is relatively straightforward to simply mark the period in which a case was issued. Its birth date is, in effect, one more case characteristic that can marked as a categorical variable and its effect assessed. Marking distinctive risky periods is considerably more complex. It affects the whole population but only for a period of time, and the nature of its effect depends on what has already occurred – in particular, the fact that cases have already dropped out, so the surviving population is not precisely comparable with the one found at earlier periods. The most conceptually sensible thing to do would be to pick a period, such as 1951-1975, and follow the population of those precedents for twenty-five years, much as an epidemiologist would do for a group of people. The chief problem with this is that for all the precedents "born" prior to this period, their risk experience is incompletely described. That is, the group is not just "right-censored" because most precedents survive but also "left-censored," and the interpretation of this can be very difficult.[74] Since statisticians generally recommend that one not do this and redefine the study to avoid any left-censored data,[75] and this advice seems particularly wise in an area where hazard analysis is not well developed, I have emphasized the use of these techniques on the entire court history. Nevertheless, consistent with this restriction, one can redefine when the end of this history has occurred, as long as one maintains the beginning when the first opinion was issued. This study is based on a data collection that took the end of 2005 as its end. But it is also possible, and avoids any left-censoring, to conduct the hazard analysis at an earlier point, such as the end of 1950.

Using events only up through 1950 allows a re-estimation of the parameters and patterns as if this study were conducted in the middle of the twentieth century instead of the beginning of the twenty-first. What would legal change look like if we had no knowledge of the modern era? Using all information through 2005 gives a certain picture that combines the experience of precedent both before and after 1950; although the "riskiness" of the modern era is not assessed directly, any differences the total population has in comparison with the subset of events before 1951 can be presumed to be due to the influence of post-1950 events and changes in levels of risk. This produces the following graphic, Figure 10, for cases with and without dissent.

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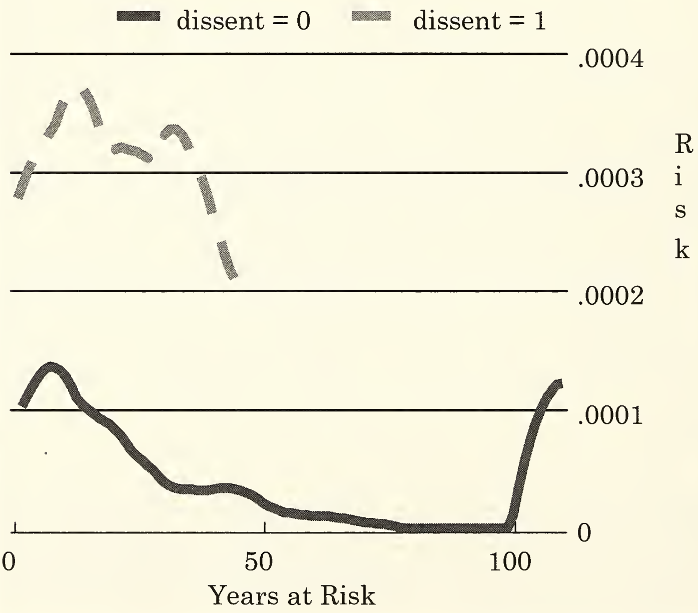
[74] "Left-censoring presents challenges not easily addressed even with the most sophisticated of survival methods". SINGER & WILLETT, *supra* note7, at 320.

[75] *See id.*

Figure 10. Hazard of Dissents c. 1950



Close inspection of Figure 10 shows that in comparison to Figure 8, which incorporates later as well as earlier data, hazard in the pre-modern era is characterized by (1) a lower overall risk with its peak somewhat above .0001, instead of near .0002, (2) an earlier peak hazard, and (3) a rapid decline in hazard with the age of the precedent. This in turn substantiates the apparent difference in the periods in which more recent decades show, first, a greater propensity to overrule and, second, a shift to overruling older precedents at least in addition to, and possibly in preference to, recent ones. The increased risk that a dissent poses to an opinion is apparent, whether the period of observation is unlimited (Fig. 8) or includes only events through 1950 (Fig. 10); although the risk to all opinions was lower in the earlier era, the multiplicative effect of dissent on risk was similar. Analysis was also done on all failures rather than just overrulings, and the effect is similar.

We can also rerun all the earlier Cox regressions to derive new parameters for the various risk factors, which are reported in Table 6. This group of cases consists of 37,730 opinions, but only 214 cases had failed at all through the end of 1950 and only 144 of them by being overturned. This small group of events inevitably reduces the statistical significance and interpretive confidence attached to the model, particularly with regard to specific categories of cases.

Table 6. Relative Hazard Effects of Selected Predictors (circa 1950)

Predictor	Relative Risk	Error	z	P-value	95% Conf.	Interval
Criminal	1.883737	.536181	.22	0.026	1.078293	3.290816
Dissent	3.46604	.9942514	.33	0.000	1.975432	6.081422
Procedure	1.546964	.3614279	.87	0.062	.9786066	2.445414
Statutory	2.713289	.8370336	.24	0.001	1.482196	4.966915
Constitutional	1.800838	.5731141	.85	0.065	.9651192	3.360225

Nevertheless, we can see that the regression estimate for the effect of dissent would have looked much the same to an analyst in 1951 as it looks to us, with a risk factor of 3.4. The level of effects created by constitutional law and procedural law are somewhat, but not dramatically, weaker and cease to be significant. By contrast, statutory law now has a stronger effect

(2.7), i.e., is more unstable. A pre-modern analysis, then, would not find support for constitutional law being less binding. This, in turn, supports Lee's historical account of constitutional/statutory distinction as being one that has not been present throughout American legal history.[76] Criminal law is at considerably less hazard in these cases. Although it remains marginally significant, its effect is a much lower 1.88 in comparison with 3.68. When all sources of failure are considered, it falls to 1.28 and ceases to be distinguishable from 1.0. This indicates that while the most recent periods of court history were more risky for all cases, they were particularly risky for criminal cases.

Apart from the criminal law change, what else can be derived from discovering that several lines of evidence converge with the commonsense view that a period with many overrulings is indeed risky? Return for a moment to the very first figure, a graphical representation of the legal history of the Illinois Supreme Court. Ignoring the early history of the court, where there were few cases, and also its most recent years, for which there has been insufficient time to overturn many cases, the number of "failed cases" accumulated between 1876 and 1975 is relatively flat, especially when compared to the distribution of cases that overturned them. This is inherently reasonable, but if the error rate is constant (measured as errors per year rather than errors per opinion), it would also be reasonable to expect that overturning cases *should also* be flat.

A constant error rate yields number of errors, e at time t, e_t. If the error correction rate, c, in subsequent periods is *also* constant, c_{t+1}, we would predict that the distribution of departures of precedent, O_t would approximate the error correction rate multiplied by the errors, or $O_t \approx c_t\ (e_{t-1} + e_{t-2} + \ldots)$. This assumes error correction is applied to all old cases presented to the court during time t, with the number of errors available for correction from the earlier period at the earlier times being adjusted downward for those already caught in O_{t-1}, so as to keep O_t approximately constant. Such a hypothetical process would be broadly consistent with declining hazard patterns characteristic of most periods in the figures described above—the more obvious errors (the "low hanging fruit") are caught at a relatively young age, whereas increasingly more obscure errors from some particular era are caught with decreasing frequency.

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[76] *See* Lee, *supra* note 10, at 718-31.

Meanwhile, new "obvious" errors are introduced into the system by the activities of recent courts and caught, maintaining an overall constant rate of overruling. Likewise, the number of "uncaught errors" in this stock should stabilize as some new errors are put in by issuance of new opinions, while approximately the same number are taken out by overruling (and again excepting the very early period where there was little precedent to review). In order to get the volatility reflected in Figure 1, therefore, either c (the rate at which past cases are identified as erroneous and rejected) or e (the number of what will be perceived as erroneous cases) must not, in fact, be constant.

Recall however, that the post-1950 period was also characterized by a massive increase in the means and medians of the age of overruled precedent, doubling from twenty to forty years during the 1950s. This is how, at least in a mathematical sense, a more-or-less constant error rate is consistent with an uneven error-correction rate. The periods of high error-correction reach back further in the past to eliminate accumulated "uncaught errors" from the previous half century.

The detection of periods of dynamism and the distinction of extrinsic and intrinsic hazards by means of citation analysis is the primary goal of the current Article. Although it would be suitable for some purposes to have remained content with merely noting the higher frequency of overruling, the more complex survival-analysis view of precedent demands a critical perspective before concluding that intrinsic factors cannot account for such a period. Indeed, some unidentified factor might still do so, but I consider it rather unlikely. It is of interest that Priest, analyzing particular lines of cases in Illinois, noted a significant amount of what he labels as instability-driven litigation during the general period identified as containing a greater extrinsic hazard.[77] "The law appears to have been unsettled" in 1958 with regard to liability for workplace injury.[78] Similarly, the primary destabilizing force in the other line of cases analyzed, having to do with the reallocation of risk between landlord and tenant for tenant injuries, occurred in 1965.[79]

The trouble with the analysis of extrinsic hazards is that they are, obviously, external to the body of legal capital they affect and are far less susceptible to identification purely by case coding. A full institutional analysis is beyond the scope of the fundamentally methodological exercise attempted here. In Part III however, I briefly consider some internal evidence supporting the notion that the legal norms regulating change may have been altered during this period, or to be more precise, the threshold for what counts as an "error" in a case may have fallen, causing a period-specific elimination of "errors" accumulated in the previous decades. This produces an explanation of the patterns described above which has some parsimony and logic to it, but which remains hypothetical, as the main purpose of the technique developed here is one of hypothesis generation rather than conclusive determination of cause.

III. EXTRINSIC HAZARD AND STARE DECISIS

The limited data available for cross-state comparison is generally presented as overruling per number of cases filed in the years of the period of overruling. As I have discussed, I think this measure is rather misconceived as a metric of hazard, since it is not *current* cases but *past* ones that form the population at risk. However, for comparative purposes, the Illinois rate during the increase does stand out. These twenty-five years produced 3341 total cases and 152 overrulings, a rate per 1000 filed opinions of 25.52. This is close to the level of turnover (23.5/1000) in the current Montana Supreme Court discussed (and decried) by Renz.[80] Comparative rates from other small states during the 1990s, North Dakota (4.98), Delaware (1.29), Rhode Island (0.46), Maine (0.91), South Dakota (2.09), Nevada (2.8), Vermont (4.07), New Hampshire (0.73), and Wyoming (2.63), all suggest a rate in the twenties as high.[81] More directly comparable to Illinois (at least during the relevant period) are larger states with an intermediate appellate court. For the thirty-one years from 1965 to 1996, that is, a period somewhat overlapping the period of interest, Lindquist & Pybas measured significantly lower rates for Alabama (6.6), Florida (6.8), Pennsylvania (7.4), and New Jersey (9.7).[82] Interestingly, the recent rates in these states approximate Illinois's "global" rate of overrulings per filings, (504/50001), or 10.1/1000 cases filed. But none of them is close to the rate during 1951-1975, suggesting by another line of evidence its unusual character.

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[77] Priest, *supra* note 1, at 216 (finding behavioral change related to Kennerly v. Shell Oil Co., 159 N.E.2d 134 (Ill. 1958) as it relates to workplace injury). Because Priest's analysis begins in 1958, it would be unable to pick up period changes between c.1950 and earlier periods. Using his method, however, as a partial external check on the one used here, it does appear that the early 50s through the mid 60s were more productive of instability than the period immediately after them.

[78] *Id.*

[79] *Id.* at 211 (analyzing the effect of Moldenhauer v. Krynski, 210 N.E.2d 809 (Ill. App. Ct. 1965).

There are many forces external to the courts that affect their operation and willingness to alter their laws. Most obviously, since courts are made of men and women who are not – nor intended to be – interchangeable, replacing personnel on the courts will lead to different outcomes, including different outcomes on cases already presented and entail legal change. In addition, it is plausible to assume general social upheaval will filter its effects into the courts (whether or not mediated by new personnel), as these institutions generally are either elected or appointed by elected officials and can be expected in some limited way to respond to "demands" for "action" from the electorate, even if these demands are inconsistent with precedent. As pointed out above, there are clear limits to the amount of causality discoverable about extrinsic hazards from analysis solely of the law itself no matter what technique is applied.

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[80] Renz, *supra* note 16, at 58. One caution is that rates on the Montana court *should* be considerably lower than those in Illinois because it is a court of mandatory jurisdiction with a higher number of filings of "easy cases" and, all else equal, a lower rate of instability per filing. (This suggests Montana in the 90s was indeed more "active" than was the ISC as any time during its history). Previous decades on the Montana court had rates that varied from 0.7 to 13.1 per 1000 filings.

[81] *Id.* at 57.

[82] Lindquist & Pybas, *supra* note 16, at 24. The numbers used by these authors are per 100 filings and are multiplied through by 10 for comparability.

Nonetheless, one crucial basis of hazard can be addressed at least partially through the cases: the variable strength of stare decisis. This variation is not (or need not be) with regard to particular *kinds* of cases (i.e. statutory, constitutional) but taken as whole and varying by historical period. If there is a general pattern of departing from precedent, one could attempt to tie this behavior to doctrinal change in a loosened norm of adherence to precedent—this doctrinal change being seen as in the nature of an elevated hazard during the period at risk. This would measure the extent that doctrine matters to, or at least marks, a changed attitude in the judiciary.[83] After all, stare decisis is supposed to be the internal norm governing the rate of change in norms.

Therefore, inquiry starting from a legal perspective might logically equate the two phenomena: where stare decisis is present, change is absent. This is incorrect even if one takes the doctrine at face value, however. Precedential stare decisis does not purport to prevent change; rather, precedents are supposed to act as the "stabilizers and brakes, rather than [the] engines and accelerators"[84] within the machinery of norm production. One method, potentially more accessible to legal analysis, treats the institutional norm of stare decisis as a variable whose greater or lesser strength inversely relates to the rate of legal change.

We should be very careful not to treat stare decisis as *equivalent* to the rate of legal change, however. This is incorrect because a measure of legal change—the primary focus of this Article—represents the observable result of both the "accelerators" and the "brakes." If one is unable to measure the accelerators, and these may vary over time, just seeing the speed cannot tell you definitively how hard the brakes are being applied. Assuming stare decisis sets specific additional conditions for a case to be decided in a way opposite to the way a similar past case was decided, the rate at which such conditions may be satisfied can vary through time (*ex hypothesi*), even if the *doctrine* governing path dependence, and fidelity to same, remain constant. Accelerating forces are presumably extrinsic to the legal system and, among other effects, increase the costliness of path dependence in general or in particular areas of law, making it more likely that departures from precedent would be found to be justified under a *constant* norm of stare decisis (i.e., constant "brake"). In addition, such elision ignores the possibility of a substandard body of precedent more prone to failure regardless of the standard by which it is judged—that is, it fails to take account of intrinsic hazard. Although hazard analysis can deal to some extent with the latter problem, an "internal" study of this sort, where accelerating forces are not specified, measures stare decisis only indirectly. It is able to suggest at best that, *ceteris paribus*, an altered rate of legal change in some period implies a change in stare decisis as one logical potential (and likely partial) explanation. Something external to the numerical measure of change itself would be required to support such an explanation.

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[83] Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 72 (1991); Jeffrey A. Segal & Harold J. Spaeth, *The Influence of* Stare Decisis *on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996); *cf.* SPAETH & SEGAL, *supra* note 28, at 39 (for alternative method relating change to strength of precedential adherence).

[84] Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 604-05 (1987).

The working hypothesis of this explanation is that the influence of stare decisis will be detectable by observing a slower rate of legal change than would otherwise be the case if the doctrine was absent or ignored. If a court adopts a stronger version of stare decisis with regard to statutory issues, for instance, cases with those issues will change less frequently, and if one period of time adopts a stronger version generally, then cases of all types will be at reduced hazard. In order to measure if this is behaviorally true, though, there needs to be an independent measurement of various courts' relative levels of adherence to this doctrine. If rates of change are indeed inversely correlated with the level of strength accorded by the court to the principle of stare decisis, this will provide evidence that, at minimum, supports the idea that legal norms towards precedent might matter, which has been contested by a number of commentators,[85] although it does not eliminate the possibility that any correlation between doctrinal adjustment and more frequent overruling is largely the consequence of stare decisis talk being a post-hoc rhetorical makeweight.

In terms of the present analysis, stare decisis is conceived as *an institution-specific parameter restricting the extrinsic hazard of overruling past precedent.* If there is a "natural" (path-independent) rate of errors in every group of precedents, then there will be a natural rate of overruling governed by the hazard function of past precedents; stare decisis suppresses this natural rate. The number of overrulings evidenced in any period, $Period_i$, will approximate a sum of, for instance, 0.5% of the precedents issued in $Period_{i-1}$, 0.25% of the precedents issued in Period_{i-2}, and so forth, assuming that 0.5% and 0.25% reflect the hazards experienced by precedents over the length of $Period_i$, as cases go from being one to two periods old or from two to three periods old. A supreme court acts "naturally" by treating its past precedents the way that it would treat the contemporary rulings of an intermediate appellate court whose actions it reviews for error. By essentially forgiving what would have been considered "errors" if the case were coming from a current intermediate appellate rather than a past supreme court, stare decisis acts to decrease the height of the hazard function, the asymptotic number of decisions from a past period that will be overruled, and the yearly rate at which they are overruled.

Thus, in the foregoing example, and keeping the matter as simple as possible, if stare decisis is defined as a scalar parameter C, and equivalently acts on each part of every relevant

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[85] *See, e.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 818 & n.39 (1982) ("Stare decisis is applied so loosely that it seems fair to say that it does not exist as a doctrine."). Easterbrook nonetheless notes that as an institutional feature, a norm of precedent adherence is of considerable importance. Because of the controversy over the extent to which this phenomenon is "illusory," it seems manifestly unwise to build any doctrinal assumptions about it into an empirical analysis.

hazard function in the same way, $Period_i$ will show overruling equal to the ($.005/C$ * opinions issued in $Period_{i-1}$) + ($.0025/C$ * opinions issued in $Period_{i-2}$), etc.; if the number of opinions per period is constant, N, this reduces to: $O_i = N/C\ (.005 + .0025 + \ldots)$. Since ".005" and the like are just sample values taken from the segment of the graph of cumulative hazard, this further reduces to $\sum H$ (making the heroic assumption that all hazard curves are the same for each period of issuance). In the study population, the overall rate of overruling approximates to 1%, but, if stare decisis is limiting this, the true "natural hazard" is more like $C * 1\%$. This "true" rate is invisible to us unless $C=1$, in which case the strength of stare decisis has fallen to nothing.

The foregoing contrasts to some extent with the definition of stare decisis used by Segal and Spaeth, who attempt to identify when the force of past decisions causes judges to decide opposite to the way they would (or rather, did) in a case of first impression.[86] Their approach necessitates a focus on particular *judges* rather than the institution they are a part of and, moreover, requires the judge (1) to have dissented in a prior case, and then (2) to have concurred in a later, similar case upholding the proposition with which they previously disagreed, and (3) to have done so out of respect for precedent rather than a change in legal reasoning.[87] However, individual judges may persist in their views because they believe that they are dissenting in the interest of stare decisis, and they keep dissenting in that interest against a "deviant" line of cases for the same reason.[88] Moreover, although dissents reveal something about personal psychology, the stability values purportedly served by stare decisis are those of *the law*, contained in lead opinions, so whether or not dissenters persist in their dissent has no direct relevance to the question of legal volatility.[89]

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[86] Segal & Spaeth, *supra* note 83, at 983.

[87] *Cf.* United States *ex rel.* Fong Foo v. Shaughnessy, 234 F.2d 715, 719 (2d Cir. 1955) ("Stare decisis has no bite when it means merely that a court adheres to a precedent it considers correct. It is significant only when a court feels constrained to stick to a former ruling although the Court has come to regard it as unwise or unjust.") (refusing to apply stare decisis); Maki v. Frelk, 239 N.E.2d 445, 447 (Ill. 1968) ("rules long recognized as the law should not be departed from merely because the court is of the opinion that it might decide otherwise were the question a new one") (adhering to contributory negligence).

[88] *See* Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 483-84 (2001) (reviewing and offering an extended methodological critique of Spaeth & Segal (1999)'s failure to capture the phenomenon). To take a single example of the problem

Although it is infrequently mentioned when overruling cases (or sustaining them), Illinois has what would appear to be a fairly clear qualitative test for when it will overturn cases it believes to be in error. We can hypothesize that a qualitative test requiring no more than a showing the prior case was "wrong" is one that is equivalent to there being no stare decisis, no path dependence, a value of C approximating 1, and a "natural rate" of overruling. To the extent any greater showing than mere error is required, some "erroneous cases" will not qualify for overruling, and $C > 1$. The relative stringency of the tests—to the extent they either guide or reflect judicial behavior—ought to be measures of the relative level of C, which in turn translates into relatively lower levels of extrinsic hazard.

The Illinois Supreme Court has mentioned "stare decisis" in 201 different opinions. Of course, according to the working hypothesis of the average lawyer shared here, the court operates under some variant of the norm of stare decisis in all of the other opinions, perhaps indeed more so in those other opinions. However, only when stare decisis is discussed would it ever be possible to perceive the differential operation of these variants directly, so these cases formed the basis for my initial

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with this approach, consider one of the most recent examples of overruling in the study population, *People v. Jones*, 797 N.E.2d 640 (Ill. 2003) (overruling *People v. Klingenberg*, 665 N.E.2d 1370 (Ill. 1996)). All the judges in the *Jones* majority had not been on the ISC for *Klingenberg*, so we cannot "tell" what effect respect for this precedent had on them, but it *may* have had *some*, despite not being determinative. The lead dissenter, Chief Justice McMorrow, was in the majority in *Klingenberg*, and so she simply maintains her position—which she makes clear she would take if the case were novel. Only Justice Freeman, who was in the minority on *both* cases, and who makes clear his *Jones* dissent is based on stare decisis alone, can be labeled as in favor of the viability of the doctrine under the "counting justices" method. And ironically, because Justice Freeman's views on stare decisis are enunciated in dissent, it is hard to accord them legal as opposed to behavioral significance.

[89] As discussed *supra*, it is reasonable to assume that dissents have an *indirect* relevance by making it more likely that the case to which they are attached is likely to be overruled. *See also* Gillman, *supra* note 88, at 482 & n.19.

inquiry. Moreover, I did not attempt to trace alternative formulations where, e.g., the court states that it must adhere to (or depart from) precedent without mentioning the magic Latin phrase. This, together with a study of the relevant law in the appellate courts, would be appropriate in a full doctrinal history of the Illinois law of stare decisis, in which one attempts to tease out the "true" rule from the chaos of formulations, but that is not the purpose here. Instead, the question is whether the variable rates of legal change are governed in some manner by written rules.

A reading of the case law would reveal what would appear to be a fairly workable test, reflecting requirements above the demonstration of mere error in a prior case. This is enunciated in, *inter alia*, *Pasquale v. Speed Products Engineering* in 1995: "When a rule of law has once been settled, contravening no statute or constitutional principles, such rule ought to be followed under the doctrine of stare decisis unless it can be shown that serious detriment is thereby likely to arise prejudicial to public interest."[90] Therefore, under *Pasquale*, before common-law weighing of precedent and equities is to begin, the proponent for an overruling must make a prior showing that the precedent attacked is inconsistent with a statute, with state or federal constitutional law, or alternatively, that as a practical matter the precedent has caused "serious detriment."[91] Such a test has nothing to do with "trends" or majority rules, new policy sensitivities, or a reassessment of the relative strength of common-law arguments as these would only be relevant after the first inquiry. Consequently, only a subset of suboptimal or erroneous past decisions would be eligible to be revisited under this rule. As will be discussed though, *tests in general* have never been consistently applied to this area in Illinois, much less this particular test.[92] This does not mean that there is no stare decisis as a phenomenon, or even as an internal norm governing the conduct of judges, only that—seemingly by choice—there is no *articulated*, *enforced* norm governing the rate of legal change.

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[90] 654 N.E.2d 1365, 1373 (Ill. 1995) (adhering to precedent).

[91] *Id.* An economic perspective would suggest that parties could show this "serious detriment" by means of the opportunity cost of the alternative norm they are urging. That is, they could satisfy the standard not merely by adducing instances of "harm" but by showing the lost benefits the state has suffered because it has chosen the rule attacked. At the same time, of course, elementary economics would suggest that the party be forced to actually show his alternative would be better, not merely that the attacked rule has been detrimental.

Hypothesizing that variation in extrinsic hazard tracks variation in *C*, variation could not occur unless there was an internalized norm operating on decision-makers, with variants of this norm giving different answers as to the appropriate rate of legal change that a court of last resort should engage in with regard to its own precedents. I doubt that Illinois is exceptional in its regular claim, perhaps hortatory in nature, that stare decisis is critical to the functioning of the legal system even (or especially) when they have chosen to ignore it. As expressed by the ISC during a period of exceptionally slow change:

> The stability of the rules of law by which the rights of citizens are determined is always the highest concern of courts of last resort. Rules of law once well established ought not to be lightly annulled and new foundations laid, which would result in a restless instability and unending uncertainty as to what the law is. If the maxim of stare decisis be disregarded and every case determined according to the way in which the court might be disposed to regard it if it were a matter of first impression, the result would be continued confusion and endless fluctuations.[93]

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[92] This test, balancing harms in a manner similar to that where a preliminary injunction is involved, originates with *Neff v. George*, 4 N.E.2d 388, 391 (Ill. 1936). *See also* Prall v. Burckhartt, 132 N.E. 280, 288 (Ill. 1921) ("Where the error of a previous decision is recognized, the question whether or not the rule of stare decisis shall be followed becomes a simple choice between relative evils. The rule should be adhered to unless it appears that the principle established must be productive of greater mischief to the community than can possibly ensue from not following previous decisions on the subject."). The other main test—which was never clearly distinguished from the first and which *Neff* also mentions, was essentially temporal and accorded stare decisis effect to "decisions long acquiesced in." *Neff*, 4 N.E.2d at 391.

[93] Ohnesorge v. Chicago City Ry. Co., 102 N.E. 819, 823 (Ill. 1913). Ohnesorge sends plaintiffs off with this further *bon mot* which should do nothing to dispel the view of stare decisis as a term of rhetoric:

> As was well said by the Supreme Court of Virginia: 'Without the observance of stare decisis the law is divested of one of its most important attributes, be-

Given this attitude, one might suppose it preferable that the norm preventing such confusion would itself be fully articulated, as well as consistent. Indeed the rule at work is especially opaque because of the written doctrine of stare decisis, which bears only a loose relationship with the unwritten and governing doctrine. Under the logic of stare decisis itself, regardless of the actual rate of change, this creates a new sort of "meta-instability," an uncertainty about how stable the law really is, and pushes the confusion back one level.[94]

The first variant of the rule of precedent adherence in Illinois was given by *Bowers v. Green* in 1832, which happens to be the first case (as generated by the automated process) in which the court overruled one of its precedents.[95] *Bowers* announced its rule of stare decisis, treated this as a question preliminary to consideration of the merits, and applied it to the challenged precedent, which it found to be inconsistent with the relevant statute and likely to work grave injustice, and therefore overruled. Subsequent nineteenth century decisions present a "rule" of pure path dependence rather than a balancing of harms, specifying that stare decisis is created by repeated reliance by courts on a particular principle. In each overruling case, the decisions are targeted at the removal of what is characterized as an erroneous outlier precedent, not

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> comes fluctuating and capricious, and instead of being a steady light to guide, or shield to protect, becomes an ignus fatuus to mislead, or a snare to entrap the citizen.'

Id. (quoting Perkins v. Clements, 1 Pat. & H. 141 (Va. 1855)).

[94] It is notable how the Court speaks in the language of "stability" and "fluctuations." If nothing else, this study has taken seriously the challenge of treating such terms in the appropriately formal fashion. Freed of doctrine, except as occasional indicator, it is possible to treat stare decisis in terms of the background hazard of precedential failure, a measurable rate to which general quantitative techniques can be applied.

[95] 2 Ill. (1 Scam.) 42 (1832) (overruling Clark v. Ross, 1 Ill. (Breese) 334 (1830)) ("The maxim, *Stare decisis*, is one of great importance in the administration of justice, and ought not to be departed from for slight or trivial causes; yet this rule has never been carried so far as to preclude Courts from investigating former decisions, when the question has not undergone repeated examination, and become well settled. Wherever the construction of a statute has been repeatedly given in the same way, or where a construction has been given and acquiesced in for a number of years, it would be manifestly improper for a court to disturb questions thus settled.").

well-entrenched.[96] In part these courts are relying on their historical primacy: relative lack of domestic precedent allows them to make use of a rule of stare decisis that *will become* increasingly strong over time, but which has not yet gained the power to bind, and stop correction of any particular errors they note.[97]

The automated method identifies 284 overrulings or abrogations of earlier cases by the Illinois Supreme Court itself. Of these cases, thirty, or a little more than 10%, even mention stare decisis, and many of those do so only in dissent. Interestingly, although the example set in 1832 was infrequently followed over the decades, several of the most recent terminating cases, beginning in 1998, have included doctrinal discussions. *Jones*, discussed *supra*, and *People v. Mitchell* (2000),[98] created stare decisis opinions in dissent, concurrence, and lead. Others have mentioned this problem only in concurrence or dissent.[99] Apart from this recent interest, lead discussions have tended to be scattered throughout the Illinois Reports—with the exception of a particularly active period around 1960.

Interestingly, opinions issued about this time (in the midst of the spike of overruling) seem to articulate a *different* model of stare decisis than the one that had been governing (in theory) the ISC up until that time, and it is arguably a less stringent standard than either this early rule or a rule of the sort described by *Pasquale*. The fact that this standard coincides in time with judicial behavior consistent with increased extrinsic hazard is in accord with the hazard analysis, but it should be noted the rule is announced *after* much of the behavior putatively consistent with the rule has already occurred, giving it the flavor of a "post-facto rationalizations of results."[100] More charitably, it could be thought of as a more-or-less accurate reflection of the implicit meta-norm that had been governing the ISC for some time prior. Here is what the 1960 Court has to say about stare decisis:

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[96] This type of language is typical of overruling decisions in nineteenth century Illinois, which generally portrayed its actions as error-correcting in nature. *Cf.* Lee, *supra* note 10, at 682-87 (discussing error-correction norms in the nineteenth century U.S. Supreme Court). Whether it is a more or less stringent test than the "compelling reasons" or "good cause" standard currently used is not determinable from language alone.

[97] *See* Hathaway, *supra* note 9, on the importance and relative freedom of courts in this position.

[98] 727 N.E.2d 254 (Ill. 2000).

[99] People v. Boclair, 789 N.E.2d 734, 750 (Ill. 2002) (Freeman, J., concurring); People v. Tisdel, 775 N.E.2d 921, 931 (Ill. 2002) (McMorrow, J., dissenting); McMahan v. Indus. Comm'n, 702 N.E.2d 545, 554 (Ill. 1998) (Heiple, J., concurring).

> [T]he common-law rule . . . is but an illogical anachronism, originating in a vastly different social order, and pock-marked by judicial refinements, [and] it should not be perpetuated in the name of "stare decisis." That doctrine does not confine our courts to the "Calf Path," nor to any rule currently enjoying a numerical superiority of adherents. "Stare decisis" ought not to be the excuse for decision where reason is lacking.[101]

The "test" employed here is an extremely weak one, entirely contravening the doctrine as it is normally understood. The test explicitly rejects under the sobriquet of the "Calf Path" any independent force of path dependence, thus seemingly shifting any unwillingness to correct errors toward what I have characterized as $C=1$ or the "natural rate." That this is reflective of a general attitude is supported by the discussion of stare decisis on which the above case built, authorizing departure "from *stare decisis* because we believe justice and policy require such departure."[102] A similarly weak standard was enunciated in 1947, just prior to the increase in overruling activity, that "when doubts are raised in the minds of the court as to the correctness of its decision, it is its duty to re-examine the question involved in the case."[103] Again, "doubts" should not be enough under any meaningful test; if the court knows the precedent is wrong, that is another matter.[104]

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[100] Cross, *supra* note 29, at 267; *see also* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988) (distinguishing self-report of decision-making reflected in opinions from actual motivation).

[101] Dini v. Naiditch, 170 N.E.2d 881, 885-86 (Ill. 1960).

[102] Molitor v. Kaneland Cmty. Unit Dist. No. 302, 163 N.E.2d 89, 96 (Ill. 1959).

[103] Doggett v. N. Am. Life Ins. Co., 71 N.E.2d 686, 688-91 (Ill. 1947).

[104] *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 53 (2001) (arguing that in addition to normal bases for overruling, a court should be permitted to overrule obviously wrong decisions).

Hazard analysis is diagnostic and probably incapable of providing a definitive answer as to *why* the error correction rate would increase, either tacitly or explicitly. One possibility is that an increased willingness to overrule past decisions may have been a consequence of the legal realist style of jurisprudence. Justice Scalia, for one, appears to associate the baleful influence of realism with this dynamism at a similar point in history: "Whether cause or effect, there is no doubt that the era . . . was marked by a newfound disregard for *stare decisis*."[105]

Whether characterized as "realist" or not, further inspection of the type of cases overruled provide some clues as to the rationale behind increased norm replacement. There were, for instance, several cases expanding liability on equitable grounds[106] with the court eventually adopting comparative negligence, despite the failure of several legislative attempts to do so.[107] If there is a consistent theme, it is that decisions during the period of the increase were more reluctant to suggest that the legislature fix "the problem" or to assume legislative acquiescence to an earlier precedent had occurred by the incorporation of the doctrine into the common law.[108] Although, as we have seen, later courts were, if anything, more respectful of interpretations of current statutes, yet this did not necessarily extend to a greater respect for legislative *inaction*. If previous versions of stare decisis were calibrated to assign some subset of court errors for correction by the legislature, and this subset shrank, the rate of overruling as well as the doctrinal justification could well reflect a new conception of the judicial role.

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[105] Harper v. Va. Dep't of Taxation, 509 U.S. 86, 108-09 (1993) (Scalia, J., concurring) (considering, apparently, the period from 1960-1969, and tracing a proposed legal instability to the influence of realist thinking).

[106] McDaniel v. Bullard, 216 N.E.2d 140 (Ill. 1966).

[107] Alvis v. Ribar, 421 N.E.2d 886, 896 (Ill. 1981) (discarding contributory negligence and overruling Maki v. Frelk, 239 N.E.2d 445 (Ill. 1968)).

[108] *See McDaniel*, 216 N.E.2d at 145 (Underwood, J., dissenting) (disagreeing "with the majority as to the proper forum for a determination of the changes best suited to serve the objects of modern society and conditions of present-day life"); *see also* Republic Steel Corp. v. Indus. Comm'n, 196 N.E.2d 654, 656 (Ill. 1964) (Underwood, J., dissenting) ("Petitioner seeks only a change in existing law. Its arguments in support thereof, under our form of government, are properly addressed to the legislative branch."); *accord Alvis*, 421 N.E.2d at 898-99 (Underwood, J., dissenting). The point to be drawn from this series of dissents is, I think, that although phrased as a difference in stare decisis, Justice Underwood differed more basically with his colleagues about separation of powers. For much more on the doctrinal variants leading judges to adopt one or another view of the relation between decisional and statutory law, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION, 241-52 (1994).

If the 1950s were the *first* period where this attitude was present, then courts in this period (and not later courts) were the ones faced with a large body of precedent filtered through a *different* standard, and therefore had the opportunity to correct more of what will now be deemed errors, implying that the decline and subsequent equilibrium level of overrulings is a direct consequence of errors (under the new standard) having been fixed earlier. In other words, there is actually no need to assume from the data that the error correction rate differs between 1960 and 2005, even though the rates of overruling do. This can be illustrated by a simple example. Assume that under the post-1950 standard, 2% of opinions will eventually be found to be erroneous, but in the pre-1950 standard only 1% of opinions were treated in this way. In order to move the level of precedent survival toward a new asymptote, there is likely to be a period of rapid overruling of what was previously held acceptable. This will create hazard elevated in the later life spans for some past periods with inflection points around the period of transition; this is observed for Periods 3 and 4 in Figure 9 above. In further periods under the new standard however, this "backlog" will gradually diminish creating a new, higher equilibrium rate of overruling.

Consequently, as a parsimonious explanation, we can characterize the extrinsic hazard as related to an adjustment in the internal norm governing legal change that is based in a fundamental attitude regarding the relative responsibility of the judiciary and the legislative branch for the enunciation of norms and the correcting of sub-optimal norms. Hypothetically, the predominance of a view allocating more responsibility to the judiciary led in turn to a greater rate of error-correction, including errors from the more distant past that had been left to the legislative branch by previous courts. This in turn generates the pattern and higher level of precedent lethality in the 1950-1964 era.

Apart from increasing the error correction rate, there appears to have been another distinctive post-1950 change in the treatment of precedent that is reflected in a new *pattern* to overruling going along with the change in the rate of overruling. Both behaviorally and doctrinally, the court appears to have reversed the value it at one time accorded to the age of precedents. Under the reliance theory of the nineteenth century, the protective effect of stare decisis in principle increased with the age of the precedent under potential reconsideration. Initially, the court's expressed attitude operated rather like the proverb, "Old truths, old laws, old boots, old books, and old friends are the best."[109]

However, during the last few decades this weight has decreased, so that age could be said in 1960 to indicate a rule was "an illogical anachronism, originating in a vastly different social order."[110] Likewise, an Illinois judge proclaimed that "[c]hanging times and circumstances may convince us, in appropriate cases, to overrule past precedent. I cannot in good conscience, however, argue for the overruling of a case written in ink which is not yet dry."[111] This sentiment would have appeared inexplicable under the earlier theory of precedential departure, which supposed the best time to wipe something away would have been while it was still wet.

The quite distinct hazard patterns were shown in the hazards reflected in Figures 8 and 10, *supra*. Whether the phenomenon occurred for doctrinal or other reasons, the interpretation is straightforward—prior to the modern era, if a precedent survived for twenty-five to thirty years, it was essentially "home free" and at very little risk of ever being overturned. In recent decades, however, that has changed, such that the total hazard to which a precedent is exposed accumulates more slowly and is extended over a long period of time.

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[109] RUSSELL KIRK, *What is Conservatism?*, *in* THE ESSENTIAL RUSSELL KIRK 21 (George A. Panichas, ed., 2007) (quoting this "conservative Polish proverb").

[110] Dini v. Naiditch, 170 N.E.2d 881, 885 (Ill. 1960).

[111] People *ex rel.* Daley v. Strayhorn, 521 N.E.2d 864, 873 (Ill. 1988) (Clark, J., concurring specially).

Possibly, the jurisprudential argument against ancient precedents was simply put forward in order to justify the necessary, albeit temporary, clearing of the "backlog" of old dubious precedents once a new threshold for error was introduced. At the same time, the changed attitude toward received wisdom and permanency might reflect a broader and more profound cultural shift, which might or might not in turn be founded in the economic rationale that a more rapidly changing society should treat older norms as more likely to be inefficient solutions. Comparative study into whether this transformation is evidenced nationally could provide future insight into a difficult and interesting institutional shift.

A study of the type conducted here cannot hope to resolve the normative question that divides, for instance, Justice Scalia's support of age as a protective factor from the critics of this approach. What it can do, however, is more closely define and operationalize this dispute and perhaps demonstrate why it is central to the question of stare decisis. A decision to have a lower level of protection accorded to age inevitably means that the rate of overruling will increase, and thus increase instability of the legal system. Whether this is worth the cost in a particular case probably requires a systematic analysis of the actual level of reliance a legal rule has inspired and the relative advantage of a proposed alternative, in line with some forms of Illinois stare decisis discussed above. This would be clearly preferable to any generalized reference to antiquity (assuming reliance and high transition costs) or changes in society between the time of the case and the present (assuming inefficiency and high opportunity costs to not making a legal change). Put another way, age is at best a proxy, and should not be a determinative factor either way, where better information about costs and benefits is available.

The larger normative question is whether, however it is doctrinally framed, the looser or weaker version of stare decisis is to be generally preferred. It has been far from the purpose of this Article to take on this question directly. Perhaps the correct position is the one Illinois apparently has taken, with a stronger form as its case law developed and a weaker form in the rapid economic and social changes that came after the

Second World War.[112] What has been attempted here is, instead, a needed preliminary to answering normative questions. To address whether a looser norm of stare decisis serves legal and social goals better, it is necessary first to actually identify when this is present and the measurable extent to which it affects behavior. Once this is done, it becomes feasible to assess its consequences.

In the case of Illinois, subsequent questions could focus on whether Illinois, during its period of looser stare decisis, moved more rapidly than it had previously (or in comparison with states that do not have a measurable increase in hazard to precedent) toward adoption of what are agreed to be superior rules. On the other side of the ledger, one could inquire into the economic costs of greater instability, or whether some of the later problematic features of the Illinois Supreme Court that emerged in the course of this study, such as recent growing levels of dissent and increasing contentiousness over criminal law, might be somehow causally connected to the earlier adoption of a general looser norm of adherence to precedent. Given the difficulty of assessing the relative costs and benefits replacing specific rules with alternatives, it is no surprise that it is extremely challenging to determine the right course about legal change more globally. Nevertheless, clarifying the alternatives, identifying when they are in force, and measuring the differences between them are all steps towards resolution of this difficult choice in jurisprudence.

CONCLUSION

Overruling a point of former law has always provoked considerable social and intellectual controversy, certainly greater than mere "development" or clarification of the law and likely greater than the equivalent legislative process. Although hypothetically this greater attention could be due to a reliance interest on the rejected ruling, this is unlikely to be the whole story. Nobody expects successive legislatures to agree with another because it is in the nature of periodic elections to change legislative composition and therefore the laws they will pass, which may well entail reversing laws passed by an earlier, different legislature; occasionally, voters indirectly vote against certain legislation by putting in representatives who are expected to change law.

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[112] On the other hand, maybe Illinois has been wrong all along, and it should have had loose stare decisis until it identified the better rules for the state and then gradually tightened it. Though this seems less plausible, it points out the flexibility of normative argument in this area.

Social attitudes appear to be different with regard to the courts, which are supposed by many to access and implement a coherent, complete, and fixed body of law applicable by interpretation and analogy to (almost) all circumstances. To rule inconsistently with a prior court is to potentially deny this model and to open the court up to criticism of "legislating from the bench," a descriptor which stripped of its pejorative overtones accurately describes the process of selecting the best rule from among multiple alternatives. One defense would be to argue that the previous court simply made an error; the "law" (that coherent, completed, and fixed set of legal norms) existing at the time of the prior opinion should not—properly read—have resulted in the prior rule.

Although sometimes phrasing precedential change in the language in terms of error correction, the foregoing study treats precedents and legal change and stare decisis doctrine thought to govern them in a highly "realistic" way. By so proceeding, there is no intention of adopting every proposition of legal realism, either new or old. Nevertheless, given overruling as the measure of legal change, this necessarily assumes that the law is indeed changing when a court acts in this way, or as Justice O'Connor put it, "when the Court changes its mind, the law changes with it."[113] The contrary view is associated with Blackstone who argued an overruled decision must be declared to have been "*not law*" rather than merely "*bad law.*"[114] The practical differences between these two characterizations may not be completely clear, but it seems fair to admit the philosophical controversy and acknowledge that using hazards as a measure of legal change is not imagining an ever-closer approximation of "true" law, but at least operationally, treats the viability of each norm as contingent on an indefinite number of measurable factors, including the overarching attitude to the costs and benefits of legal change made through judicial action.

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[113] Harper v. Va. Dept. of Taxation, 509 U.S. 86, 115 (1993) (O'Connor, J., dissenting) (quoting her dissenting opinion in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 550 (1991)). As analytically useful as this view is for the current study, it has been derided by another Justice as alien to common-law jurisprudence, emanating instead "from the philosophy of Nietzsche." *Id.* at 107 (Scalia, J., concurring).

[114] *Id.* (Scalia, J., concurring) (emphasis in original) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 70 (1765)). There is a paradoxical nature

At no time, of course, has legal change lacked some brake on its velocity. This is true even when stare decisis ceases to be mentioned or is expressed in ways that make it a formal nullity. The rate of legal change does vary, however, depending in part on the governing internal meta-norm of the legal decisionmakers. This internal parameter can in principle be detected and evaluated by examination of the relative hazards experienced by different kinds of precedents (e.g., young, procedural, constitutional, statutory, those with dissents) and the changes in the general or type-specific hazard over time. If future patterns of hazard are relatively constant, the models and definitions developed by the system I have proposed here could potentially even assign a relative risk or "life expectancy" to any current opinion and therefore an estimate of future legal change, or at a practical level, the potential vulnerability of a precedent to attack. At the moment, considerable work both in data collection and model validation remains before such a prospective analysis could be developed and tested.

Nonetheless, the current work, and any work that will follow after it, is carried out in the shadow of Holmes's predictive theory of the law and is, in a sense, an extension and specification of that theory. If "laws" are the "prophecies of what the courts will do in fact, and nothing more pretentious,"[115] then the ultimate project foreshadowed here might be to provide a

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to claims of only now discovering the "actual" law a preexisting decision failed to find, even if this is only an "as-if" heuristic for judges to hold as a mindset while they are making rather than merely discerning law. *See* Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1154-55 (1995).

[115] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

probabilistic dimension to each "law" indicating the probability that some future court, at a particular time, will *continue* to do what it is has done, so that prophecies are made with the appropriate level of uncertainty attached to them.

THE INCONVENIENCE OF A "CONSTITUTION [THAT] FOLLOWS THE FLAG . . . BUT DOESN'T QUITE CATCH UP WITH IT": FROM *DOWNES V. BIDWELL* TO *BOUMEDIENE V. BUSH*[1]

Pedro A. Malavet[*]

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[1] The quote is the response of then Secretary of War Elihu Root when—after hearing a reading of the five opinions of the Supreme Court in the *Downes* case in May of 1901—confused reporters asked how the justices had replied to the question, "Does the constitution follow the flag?" GEORGE SHIRAS, JUSTICE GEORGE SHIRAS, JR. OF PITTSBURGH, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, 1892-1903: A CHRONICLE OF HIS FAMILY, LIFE, AND TIMES 191 (Winfield Shiras ed., Univ. of Pittsburgh Press 1953) (citing ARTHUR WALLACE DUNN, FROM HARRISON TO HARDING: A PERSONAL NARRATIVE, COVERING A THIRD OF A CENTURY, 1888-1921, at 256-57 (1922)). As the title suggests, this article is a follow up to my book chapter *"The Constitution Follows the Flag . . . but Doesn't Quite Catch Up with It": The Story of* Downes v. Bidwell, *in* RACE LAW STORIES 111 (Rachel F. Moran & Devon W. Carbado eds., 2008) [hereinafter *The Story of* Downes]. The chapter and article also reflect the content of my book AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (N.Y. Univ. Press 2004) [hereinafter AMERICA'S COLONY].

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INTRODUCTION

Boumediene v. Bush, resolved by the Supreme Court in June of 2008, ruled that so-called "enemy combatants" held by the United States at Guantánamo Bay Naval Station have a constitutionally-guaranteed right to habeas corpus review of their detention by federal courts.[2] In reaching this result, the majority opinion relied upon what it labeled the "doctrine" of the Insular Cases,[3] a series of decisions arising mostly as a result of the Spanish-American War of 1898. While they disagreed on whether or not the rule should apply to Guantánamo, the dissenting justices and those in the majority unanimously agreed that the over-a-century-old rule of the Insular Cases—that in order to permit substantial discretion to the executive and legislative branches of government to deal with new territories and their inhabitants, some, but not all, of the provisions of the U.S. Constitution apply *ex proprio vigore* in our territorial possessions—is still good law. Most observers will not know the real context of the old cases, and the current Supreme Court neglects to acknowledge the continuing effect of those decisions on over four million citizens of the United States who have lived with the rule of the Insular Cases for the 109 years since it was first articulated in *Downes v. Bidwell*.[4]

This article seeks to start to remedy those shortcomings by presenting the Insular Cases in their historical and sociological context to illustrate how the Court's interpretation of the Territorial Clause constitutionally "inconveniences" the territorial citizens by relegating them to second-class legal status, and arguing that the solution to the problem created by the Insular Cases lies in overruling *Downes's* use of the Territorial Clause to situationally pick and choose which constitutional provisions will be enforced in the territories.[5]

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[2] Boumediene v. Bush, 553 U.S. 723 (2008).

[3] *Boumediene*, 553 U.S. at 759.

[4] Downes v. Bidwell, 182 U.S. 244 (1901).

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[5] I began this article a few weeks after the *Boumediene* decision was issued as an attempt to greatly expand a short contribution to an anthology into an article, *see The Story of* Downes, *supra* note 1, and to discuss the Supreme Court's most recent citation of the Insular Cases. First a law review placement blunder on my part, and then a family tragedy forced me to move on to other projects and delay its publication. I posted an early version of this article on the BePress service and sent it off for publication in the fall of 2008. Within two days, I had two offers to publish it, including one from a symposium issue dedicated to the case. Unfortunately, I declined them. Luckily, this delay has provided the opportunity to review the literature produced in response to the case, and to re-assess the article's original conclusion that the Insular Cases were not seriously studied in U.S. law generally and in constitutional law in particular. A LEXIS search of published law review articles found 506 articles that referenced *Boumediene* in their text. When that search was refined to articles referencing *Boumediene* and the Insular Cases together, it produced 48 article results. (Both searches were conducted in March 2010. The first simply found references to "Boumediene w/5 Bush" in the previous two years. The second searched for the case name and the phrase "Insular Cases" in the same text, during the same time period).

An analysis of those cites found that the references to the Insular Cases were generally in passim and few authors studied the history of those cases. *See, e.g.*, Ernesto Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba: Does the "Empire Strike Back"?*, 62 SMU L. REV. 117, 142-49 (2009) (providing an overview of the Insular Cases in an article studying the legal relationship between the U.S. and Cuba, and the claims over Guantánamo Naval Station). Two well-known federal judges of Puerto Rican descent have also written substantial articles on this subject. *See* José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660 (2009); Juan Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 77 REV. JUR. U.P.R. 1 (2008). But there were some exceptions; significantly, the work of Christina Duffy Burnett, who, in a recent article entitled *A Convenient Constitution? Extraterritoriality After* Boumediene, seeks to place *Boumediene* and the Insular Cases in the context of "Fourteenth Amendment incorporation" jurisprudence, rather than in what she calls the "Territory Clause" (Territorial Clause) of the U.S. Constitution (Article IV, section 3, clause 2). Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 973 (2009) [hereinafter *A Convenient Constitution*]; By bringing the two lines of cases together, she hopes to provide a more sound way to resolve the constitutional questions that arise in these situations. *A Convenient Constitution*, *supra*, at 1042 ("I have challenged the idea that there should be two separate and unrelated ways of handling questions of constitutional scope and content, one for the domestic setting and another abroad. I have illustrated the point with a review of the Fourteenth Amendment incorporation cases, which concern essentially the same questions that the jurisprudence on constitutional extraterritoriality confronts."). While I wish that the Supreme Court decided and cited the Insular Cases as decisions about the due process owed to full citizens of the United States, *see infra*

Part I of this article will discuss the Supreme Court's recent use of the Insular Cases to support its decision on the constitutional question of suspension or availability of habeas corpus for the persons imprisoned in Guantánamo Bay. Parts II-IV will then put the Insular Cases and their primary decision, *Downes v. Bidwell,* in their proper social, historical, and legal contexts. Parts V and VI will continue with the legal context for the decision—the series of cases now labeled as the Insular Cases—and their evolution from decisions issued by a deeply divided Supreme Court into a well-accepted constitutional rule that endures today. Finally, this article will engage in a brief critical analysis of the enduring effects of *Downes* and conclude with what it tells us about the possible long-term implications of *Boumediene* and why we should engage in more serious studies of the Insular Cases.

I. *BOUMEDIENE V. BUSH*: THE INSULAR CASES IN THE TWENTY-FIRST CENTURY

Let us begin on what was supposed to be the last day of the Supreme Court term, when the justices issued an anxiously awaited decision on a case that has made front-page-news throughout their term. The case raised questions about the

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Part VII, that is not what the Court has chosen to do so far, though hopefully it will consider Burnett's suggestions. Nevertheless, Burnett's work provides an unorthodox take on and a review of the orthodox constitutional law literature's analysis of the Insular Cases.

For other unorthodox takes on the Insular Cases, see AMERICA'S COLONY, *supra* note 1; EDIBERTO ROMÁN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS (2006); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony,* 6 MICH. J. RACE & L. 1, 21-40 (2000); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism,* 26 FLA. ST. U. L. REV. 1 (1998). For unorthodox takes on American Law more generally, see RACE LAW STORIES, *supra* note 1; RICHARD DELGADO ET AL., LATINOS AND THE LAW: CASES AND MATERIALS (2008); JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2000) [hereinafter RACE AND RACES]; DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS (2d ed. 2007); EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS, CASES AND MATERIALS (2005); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).

power of the United States government to deal with the aftermath of a fast and tactically successful war as a result of which our armed forces are in effective control of a previously foreign territory, but facing various degrees of resistance ranging from political wrangling to violent and bloody insurgency. The year, however, is not 2008; it is 1901.

The May 27, 1901 ruling of the United States Supreme Court in *Downes v. Bidwell*,[6] particularly Justice Edward Douglass White's plurality opinion,[7] is today the most important of the Insular Cases. With the U.S. Armed Forces facing a guerilla war in the Philippines[8] and political wrangling in Cuba and Puerto Rico following the Spanish-American War, the policy motivations for the result in this case were straightforward. The United States was becoming a world power—a superpower in today's parlance. This power was principally expressed by deploying a large navy, which in turn required overseas bases of operations, and at the turn of the twentieth century that meant an imperial nation capable of holding colonies on which to establish military bases all over the world.[9] *Downes* effectively provides constitutional authorization for this process, by reinterpreting the Territorial Clause of the Constitution to abandon the old rule that the Constitution follows the flag to our territories *in toto,* and instead giving to Congress almost unfettered authority to deal with the territorial possessions by picking and choosing the constitutional provisions that will be allowed to apply in the territorial possessions.

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[6] Downes v. Bidwell, 182 U.S. 244 (1901).

[7] *Id.* at 287-344.

[8] Whether to call the conflict in the Philippines a war, an insurrection, an insurgency, or something else, is a matter of some controversy. *See generally* DAVID J. SILBEY, A WAR OF FRONTIER AND EMPIRE: THE PHILIPPINE-AMERICAN WAR, 1899-1902 (2007) (describing the Philippine insurgency that followed the United States victory in the Spanish-American War; the Introduction addresses the debate over what to label the conflict). President McKinley put it this way in his second inaugural address on March 4, 1901: "We are not waging war against the inhabitants of the Philippine Islands. A portion of them are making war against the United States." *Second Inaugural Address of William McKinley: Monday, March 4, 1901*, THE AVALON PROJECT: DOCUMENTS IN LAW, HISTORY AND DIPLOMACY, http://avalon.law.yale.edu/19th_century/mckin2.asp (last visited Mar. 15, 2010).

[9] *See generally* WARREN ZIMMERMANN, FIRST GREAT TRIUMPH: HOW FIVE AMERICANS MADE THEIR COUNTRY A WORLD POWER 8 (Farrar, Straus & Giroux 2002) ("John Hay, Captain Alfred T. Mahan, Elihu Root, Henry Cabot Lodge, and Theodore Roosevelt can fairly be called the fathers of modern American imperialism and the men who set the United States on the road to becoming a great power."). *See also* BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE (2006), which describes "how the United States handled its first major episode of globalization and how the Supreme Court, in [the Insular Cases], crucially redirected the course of American history." Publisher Comments on THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE, http://www.kansaspress.ku.edu/spains.html (last visited Mar. 15, 2010).

Some may consider a 1901 case to be ancient history, but *Downes* and its progeny are still applicable law, as shown most recently by *Boumediene*. Yet, while partially basing its ruling on *Downes*, the *Boumediene* Court neglected to acknowledge that *Downes* and its progeny are most pertinent to the current territorial possessions of the United States, and their population of more than four million—for the most part—citizens of the United States.

Fast-forward to 2008. Associate Justice Anthony M. Kennedy, writing for the majority of the United States Supreme Court in *Boumediene*—joined by Associate Justices John Paul Stevens, David Hackett Souter, Ruth Bader Ginsburg, and Stephen G. Breyer[10]—rearticulated the relevance of the Insular Cases as follows:

> Fundamental questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and the Philippines—ceded to the United States by Spain at the conclusion of the Spanish-American War—and Hawaii—annexed by the United States in 1898. At this point Congress chose to discontinue its previous practice of extending constitutional rights to the territories by statute.
>
> In a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. The Court held that the Constitution has independent force in these ter-

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[10] The Justices' names and order of seniority are as listed in their official biographies published by the Court. *See The Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/biographiescurrent.pdf (last visited Mar. 15, 2010) (the current posting includes the biography of the now-retired Justices O'Connor and Souter).

ritories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position.[11]

While many will hail the majority decision because its result guarantees constitutional rights to human beings being held by U.S. authorities well outside of a combat-zone, at least for the time being, this introduction by the Court in fact sets up the discussion of yet another rationalization of why "other"[12] people should not be "burdened" with the full range of rights guaranteed by our Constitution unless the Supreme Court finds it convenient for the United States. Rather than having "the Constitution follow the flag," i.e., ruling that all provisions of the Constitution, especially those that guarantee individual rights, apply *ex proprio vigore* to territorial subjects, the Supreme Court articulated a flexible test that gives great deference to the political branches of government. The Court chose to engage in a case-by-case and right-by-right analysis to decide which of the individual protections guaranteed in the Constitution to U.S. citizens in the territory of a U.S. state should be conferred upon U.S. citizens and non-citizens found in U.S. custody in a territory controlled by the U.S. that has not been incorporated into the union as a state. The rationalization of avoiding "overburdening" the different "cultures" acquired as spoils of the Spanish-American War today gives way to the needs of the so-called war on terror. As I discuss further below, on both occasions, the principal beneficiary of this flexibility is the federal government—both at the executive and legislative levels—because they are given almost unfettered authority to deal with large groups of persons who, often in spite of their U.S. citizenship, are to be treated as lesser citizens and ultimately as lesser human beings. In the words of the majority in *Boumediene*:

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[11] Boumediene v. Bush, 553 U.S. 723, 756-57 (2008).

[12] In general, as used herein, "other" and "othering," i.e., to be "othered," means to be socially constructed as "*not* normative." *See, e.g.*, Cathy J. Cohen, *Straight Gay Politics: The Limits of an Ethnic Model of Inclusion*, *in* ETHNICITY AND GROUP RIGHTS 572, 580 (Ian Shapiro & Will Kymlicka eds., 1997) ("Much of the material exclusion experienced by marginal groups is based on, or justified by, ideological processes that define these groups as 'other.' Thus, marginalization occurs, in part, when some observable characteristic or distinguishing behavior shared by a group of individuals is systematically used within the larger society to signal the inferior and subordinate status of the group.") (citation omitted).

> As the Court later made clear, "the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements."[13]

While the Supreme Court then and now characterizes this constitutional "flexibility" as both desirable and necessary, the end result of these opinions has been to leave too much discretion to the political branches of government at a time when judicial review was most needed to guarantee the basic human rights of new subjects of United States law. The territorial subjects of the United States by definition live in areas that lack full representation in the United States House of Representatives and Senate, and they are not allowed to vote in presidential elections. That leaves them without meaningful participation in the process of law making and enforcement by the United States, even though the United States is the ultimate legal authority over them and their territory.[14]

In order to justify this policy, the majority opinion in *Boumediene* focused on the Philippines and the "assumption" that they would become independent. That did indeed happen, forty-five years after the 1900 Supreme Court term ended.[15] Cuba, another territory acquired as a result of the Spanish-American War, was granted independence by the treaty that ended that war, but subject to U.S. rule, which severely limited its sovereignty for decades.[16] The majority opinion did not in any way expressly acknowledge the fate of Guam and Puerto Rico, which were then and are still territories of the United States subject to the rule of the Insular Cases. For the territorial citizens this is not a temporary transition on the way to independence, rather it is a permanent status of constitutional inferiority imposed by the U.S. Supreme Court and enforced by the executive and legislative branches now for over one hundred years.

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[13] *Boumediene*, 553 U.S. at 758.

[14] *See generally* AMERICA'S COLONY, *supra* note 1, at 47, 134, 155 (discussing "democracy deficit" in the relationship between the territory of Puerto Rico and the United States).

[15] The official date when Philippine Independence was recognized by the United States is July 4, 1946. *See* Proclamation No. 2695, 3 C.F.R. 64 (1946 Supp.), *reprinted as amended in* 22 U.S.C. § 1394 (2006), *and in* 60 Stat. 1352 (1946).

[16] *See Treaty of Paris, 1898*, *in* 1 P.R. LAWS ANN., at 16 (2008) (ending Spanish sovereignty over Cuba, subject to U.S. occupation). The Platt Amendment of 1901 official-

The majority opinion characterized the policy behind the Insular Cases thusly: "The Court thus was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired territories."[17]

No such qualms were on display during the westward expansion of the United States. The Constitution did in fact "displace[] altogether the existing legal systems [of the] newly acquired Territories," of the American West, with the full legal support of the Supreme Court.[18] The local law in Puerto Rico or

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ly recognized Cuban sovereignty, subject to severe conditions imposed by the United States. The United States Department of State describes the Amendment as follows:

> While the amendment was named after Senator Orville Platt of Connecticut, it was drafted largely by Secretary of War Elihu Root. The Platt Amendment laid down eight conditions to which the Cuban Government had to agree before the withdrawal of U.S. forces and the transfer of sovereignty would begin. . . . Although the Cuban [Constitutional Convention] delegates realized that the amendment significantly limited Cuban sovereignty, and originally refused to include it within their constitution, the U.S. Government promised them a trade treaty that would guarantee Cuban sugar exports access to the U.S. market. After several failed attempts by the Cubans to reject or modify the terms of the Platt amendment, the Cuban Constitutional Convention finally succumbed to American pressure and ratified it on June 12, 1901, by a vote of 16 to 11. The Platt Amendment remained in force until 1934 when both sides agreed to cancel the treaties that enforced it.

See Milestones: 1899-1913, The United States, Cuba, and the Platt Amendment, 1901, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, http://history.state.gov/milestones/1899-1913/Platt (last visited Mar. 15, 2010). The official end of this regime with the Treaty of 1934 is discussed *infra* notes 28-29 and accompanying text.

[17] *Boumediene*, 553 U.S. at 757. ("It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production . . ." (quoting Downes v. Bidwell, 182 U.S. 244, 282 (1901))).

[18] *See* discussion *infra* notes 171-72 and accompanying text.

Guam was not any more threatened by the application of constitutional provisions than was the law of Louisiana, California, Texas, Florida, or New York. The only legal system being protected here is that of the United States to maintain a colonial empire. Nevertheless, as the majority continues to explain the "situational" standard for the application of constitutional limitations on the powers of Congress: "These considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories."[19]

The majority went on to explain that some basic "personal rights" guaranteed by the U.S. Constitution must be applied *ex proprio vigore* to non-citizens (and, as explained below, to U.S. citizens as well) in the territorial possessions: "[A]s early as *Balzac* in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.'"[20]

The majority emphasized that it will identify which rights will be guaranteed in any particular territory at any particular time, but it will exercise that discretion so as to give Congress (and implicitly the executive branch as well) substantial lee-way: "Yet noting the inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere,' the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter."[21]

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[19] *Boumediene*, 553 U.S. at 726. The statement is supported by a quote from *Dorr v. United States*:

> Until Congress shall see fit to incorporate territory ceded by treaty into the United States, . . . the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body *as are applicable to the situation*.

195 U.S. 138, 143 (1904) (emphasis added). The Court also quotes Justice White's concurring opinion in *Downes*: "[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States." *Downes*, 182 U.S. at 293. The incorporation doctrine is discussed *infra* Part VI.

[20] *Boumediene*, 553 U.S. at 758. The statement is supported by citing *Late Corp. of Church of Jesus Christ of Latter-day Saints v. United States*: "Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments." 136 U.S. 1, 44 (1890).

The majority then proceeded to "hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause."[22]

Associate Justices Souter, Ginsburg, and Breyer concurred in a brief opinion authored by Souter. They did not mention the Insular Cases at all but rather focused on responding to the dissenting justices' arguments regarding habeas corpus statutes. The concurrence also responded to the part of Justice Scalia's dissenting opinion rejecting the majority's acceptance of de facto as distinguished from de jure sovereignty.[23]

The four remaining justices—Chief Justice John G. Roberts, Jr., and Associate Justices Antonin Scalia, Clarence Thomas, and Samuel Anthony Alito, Jr.[24]—dissented, expressing their views in two written opinions joined by all four. The first dissent, authored by the Chief Justice, did not mention the Insular Cases at all.[25] Justice Scalia's dissent stated that there is only one kind of sovereignty: de jure. In his opinion, sovereign control is the key to the application of habeas corpus, and neither the Suspension Clause nor the Insular Cases are at all applicable in this situation because we lack sovereignty over Guantánamo. He wrote:

> *Eisentrager* thus held—*held* beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.

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[21] *Boumediene*, 553 U.S. at 758-59.

[22] *Id.* at 771.

[23] *Id.* at 799.

[24] *See supra* note 10.

[25] *Boumediene*, 553 U.S. at 801-26.

> . . . .
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> The Court also reasons that *Eisentrager* must be read as a "functional" opinion because of our prior decisions in the Insular Cases. It cites our statement in *Balzac* v. *Porto Rico* that "the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." But the Court conveniently omits *Balzac's* predicate to that statement: "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the *sovereign power* of that government is exerted." The Insular Cases all concerned territories acquired by Congress under its Article IV authority and indisputably part of the sovereign territory of the United States. None of the Insular Cases stands for the proposition that aliens located outside U.S. sovereign territory have constitutional rights, and *Eisentrager* held just the opposite with respect to habeas corpus. As I have said, *Eisentrager* distinguished *Yamashita* on the ground of "our sovereignty [over the Philippines]."[26]

The majority simply read *Eisentrager* differently.

> The Court's holding in *Eisentrager* was thus consistent with the Insular Cases, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantánamo Bay, on the other hand, is no transient possession. In every practical sense Guantánamo is not abroad; it is within the constant jurisdiction of the United States.[27]

Having articulated how it applied to the Guantánamo situation, the majority argued that although the rule of the Insular Cases is a firm constitutional doctrine, it is not intended for indefinite application in any one territory. This statement, however, is belied by the experience of the current territorial possessions, as developed later in this article. Nevertheless, to illustrate its contention that the rule of the Insular Cases is intended to apply in temporary and transitional situations, the majority of the Court placed its focus and emphasis on Cuba and the Philippines as territories that were held only temporarily and transitionally–except of course for Guantánamo. The majority almost completely ignored the current status of Guam and Puerto Rico as territorial possessions that have been subjected to the rule of the Insular Cases for an indefinite period of time. Guantánamo Bay itself remains under U.S. rule, even though all members of the Court stated that the Republic of Cuba has sovereignty over that land.[28] The U.S. government

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[26] *Id.* at 855-89 (Scalia, J., dissenting) (citations and footnote omitted).

[27] *Id.* at 553 U.S. at 768-69 (majority opinion) (citation omitted) (emphasis added).

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[28] U.S. control over Guantánamo Bay Naval Station was legally established by a treaty and then a "lease." *See Agreement between* Cuba *and the* United States *for the Lease of Lands for Coaling and Naval Stations*, *in* 192 THE CONSOLIDATED TREATIES SERIES 429-30 (Clive Parry ed., 1980); *Convention between* Cuba *and the* United States *for the Establishment of Naval and Coaling Stations at Guantánamo and Bahia Honda*, *in* 193 THE CONSOLIDATED TREATIES SERIES 314-16 (Clive Parry ed., 1980). Under the Treaty of February 23, 1903, de jure sovereignty over Guantánamo Naval Station belongs to the Cuban government, but de facto control belongs to the United States. Article III of the Treaty of February 23, 1903, reads:

> While on the one hand the United States recognizes the continuance of the ultimate *sovereignty of the Republic of Cuba* over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement *the United States shall exercise complete jurisdiction and control over and within said areas* with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

192 THE CONSOLIDATED TREATIES SERIES, at 430 (emphasis added). The majority in *Boumediene* accepted the government's position regarding sovereignty over Guantánamo. The Court explained:

> [F]or purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains de jure sovereignty over Guantánamo Bay. As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over this territory.

Boumediene, 553 U.S. at 775. As noted above, the dissenters felt that the matter of de jure sovereignty was decisive on this case. However, the majority ruled that the constitutional habeas corpus Suspension Clause is binding upon the United States in territory under its de facto sovereignty. *Id.; see also* Rasul v. Bush, 542 U.S. 466, 484 (2004) (6-3 ruling that statutory habeas corpus was available to persons held by the United States in territory under the de jure sovereignty of another country, but de facto con-

"lease" of Guantánamo is, from the American perspective, indefinite, in that the U.S. takes the position that both sides must agree to terminate the lease or to change its provisions in any way.[29] Accordingly, the suggestion that the constitutionally-flexible case-by-case approach adopted by the majority is not going to be applied indefinitely in a particular territory is a rank fallacy.

Moreover, the majority's only acknowledgement of one of the current territorial possessions subject to U.S. sovereignty, Puerto Rico, makes it clear that the almost four million U.S. citizens living there have only the constitutional rights that the Court "situationally"—and from my perspective most inconveniently—chooses to allocate to them. Specifically, the majority opinion stated that it is possible for the bundle of rights applicable in a particular territory to change over time. It wrote:

> It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance. [Compare] *Torres* v. *Puerto Rico*: "Whatever the validity of the [Insular Cases] in the particular historical context in which they were de-

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trol of the United States; Justice Scalia, Chief Justice Rehnquist, and Justice Thomas dissented).

[29] This is based on the language of the original Treaty of February 23, 1903, as modified by the 1934 Treaty that legally ended the regime that expressly allowed direct interference by the United States in internal Cuban affairs. *See* Treaty of 1934, 48 Stat. 1682 (1934). Article III of the Treaty reads in pertinent part:

> So long as the United States of America shall not abandon the said naval station of Guantánamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.

Id. at 1683. Prior to 1934, legal authorization for unilateral U.S intervention in Cuba was guaranteed by an additional agreement signed in 1903. *See Treaty between* Cuba *and the* United States *determining their Relations, in* 193 THE CONSOLIDATED TREATIES SERIES, *supra* note 28, at 198-201 (Article III provides: "That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba."). The Treaty of May 22, 1903, was generally superseded by the Treaty of 1934.

> cided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's."[30]

The "constitutionally significant" change that the majority anticipates is one that might expand (or contract) the "personal rights" guaranteed by the Constitution to the territorial subjects or citizens. The fundamental constitutional nature of the relationship between the United States and its territories will not change, however, because that will still be governed by the Territorial Clause as interpreted by the Insular Cases. The right to choose which constitutional provision(s) will apply in the territories is the crux of the Court's use of the Territorial Clause to create the so-called "doctrine of the Insular Cases" and their progeny.

The only thing that remains clear after *Boumediene* is the so-far indefinite and continuous application of the Insular Cases to the territorial citizens, subjects and possessions of the United States acquired following the Spanish-American War. Though they disagree as to whether those cases apply to the Guantánamo detentions, all members of the current Supreme Court clearly agree that the Insular Cases are still good law. The entire Court is also unanimous that the White plurality in *Downes*, as adopted in *Balzac*, is the primary articulation of the rule of the Insular Cases. The remainder of this article explains and critiques how a three-judge plurality issued by a deeply divided Court in 1901 became the firmly established rule, as expressly recognized by *Balzac* in 1922, and remains in vigor to this day.

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[30] *Boumediene*, 553 U.S. at 758 (quoting Torres v. Puerto Rico, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring in judgement)).

II. SOCIAL, HISTORICAL, AND LEGAL CONTEXT: *OUR* ISLANDS AND *THEIR* PEOPLE[31]

Our Constitution does not refer to insular possessions; rather, it uses the label "territory," in the aptly labeled Territorial Clause of the Constitution of the United States, which reads: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."[32]

Initially, the Clause was applied to most of the thirty-seven territories that became states after the original thirteen colonies.[33] For example, Alaska and Hawaii are current states that were regulated by legislation passed by Congress pursuant to the Territorial Clause, but that legislation was repealed or became obsolete after statehood.[34] Right now, and legally as a result of the Insular Cases, as Arnold Leibowitz explains:

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[31] *See generally* JOSÉ DE OLIVARES, OUR ISLANDS AND THEIR PEOPLE AS SEEN WITH CAMERA AND PENCIL (William S. Bryan ed., N.D. Thompson Publishing Co. 1899). This is a large two-volume coffee-table book set purportedly describing the new island territories that were sold door-to-door after the war.

[32] U.S. CONST. art. IV, § 3, cl. 2.

[33] The possible exception is Texas, which, from the American perspective, seceded from Mexico and became a state of the union after being an "independent Republic." But that left open the period between the congressional annexation vote on March 1, 1845, and the formal statehood admission in December of 1845. In *De Lima v. Bidwell*, the majority notes: "Texas remained a foreign state until December 29, [1845], when she was formally admitted." 182 U.S. 1, 191 (1901). For a succinct distinction between the continental territories and the island territories, see ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 4-16 (Kluwer Academic 1989).

[34] As to Alaska, see 48 U.S.C. § 21 (2006); as to Hawaii, see 48 U.S.C. § 491 (2006). Alaska was officially admitted into statehood on January 3, 1959. *See* Proclamation No. 3269, 73 Stat. c16 (1959); Act of 1958, Pub. L. No. 85-508, 72 Stat. 339 (1958). Hawaii was admitted by law as of March 18, 1959. *See* Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959). But section 2 of this law excepted "the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters." 73 Stat. at 4.

> The United States [is] . . . the largest overseas territorial power in the world. [It] now governs five areas (Puerto Rico, [the] Virgin Islands, Guam, the Northern Marianas, and American Samoa) with a population of almost four million people[,] and has special responsibilities for three additional areas (Federated States of Micronesia, the Marshall Islands and Palau).[35]

In the era pertinent to the Insular Cases, statutes passed on the authority of the Territorial Clause refer to these as "possessions," "insular possessions," or "insular areas."[36] Pursuant to these statutes, the United States controls or has a legal relationship with the eight populated island territories named above, and controls several unpopulated islands.[37] The populated territories collectively have well over four million residents,[38] and among this group, only the Samoans are not citizens of the United States.[39]

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[35] LEIBOWITZ, *supra* note 33, at 3.

[36] *See generally* 48 U.S.C. (2006). The Department of the Interior's Office of Insular Affairs currently defines the term as follows:

> A jurisdiction that is neither a part of one of the several States nor a Federal district. This is the current generic term to refer to any commonwealth, freely associated state, possession or territory or Territory [sic] and from July 18, 1947, until October 1, 1994, the Trust Territory of the Pacific Islands. Unmodified, it may refer not only to a jurisdiction which is under United States sovereignty but also to one which is not, *i.e.*, a freely associated state or, 1947-94, the Trust Territory of the Pacific Islands or one of the districts of the Trust Territory of the Pacific Islands.

Definitions of Insular Area Political Organizations, U.S. DEP'T OF THE INTERIOR, OFFICE OF INSULAR AFFAIRS, http://www.doi.gov/oia/Islandpages/political_types.htm (last visited Mar. 15, 2010).

[37] In its "Island Fact Sheet," the Department of the Interior's Office of Insular Affairs identifies unpopulated island territories of the United States under designated categories: U.S. Territories under OIA are Palmyra Atoll (Excluded Areas) and Wake Atoll (Residual Administration); U.S. Territories under U.S. Fish and Wildlife Jurisdiction, often referred to as the Guano Islands, are Baker Island, Howland Island, Jarvis Island, Johnston Atoll . . . Kingman Reef, Navassa Island and Palmyra Atoll. *All OIA Jurisdictions*, U.S. DEP'T OF THE INTERIOR, OFFICE OF INSULAR AFFAIRS, http://www.doi.gov/oia/Firstpginfo/islandfactsheet.htm (last visited Mar. 15, 2010). *See generally* LEIBOWITZ, *supra* note 33, at 3. On the Guano Islands, see 48 U.S.C. § 1411 (2006) ("Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.").

Several unpopulated islands, and the eight populated island territories of the United States and any U.S. national or citizen living in or traveling to them is currently subject to the constitutional doctrine of the Insular Cases issued in the days of President William McKinley.[40]

III. PUERTO RICO IN 1901: SELF-GOVERNMENT AND SPANISH CITIZENSHIP THAT DID NOT LAST LONG

For Puerto Rican islanders, the Insular Cases were not simply the start of their second colonial period, but the extension of 400 years of colonial status that initially deprived them of legal citizenship in the country that ruled over them.

Puerto Rico is a group of islands bordered by the Atlantic Ocean and Caribbean Sea. The main island is known as Puerto Rico and is joined by adjacent smaller islands that include Vieques, Culebra, Mona, and Monito.[41] The main island—which is roughly 160 kilometers long and 53 kilometers wide and contains most of Puerto Rico's 8959 square kilometers of land area—is the home of all but a few thousand of its inhabitants. Therefore, the archipelago is generally referred to as the *Isla del Encanto* (enchanted island or isle of enchantment) or, simply, the "island." For about five centuries before Christopher Columbus claimed the territory for Spain in 1493, Taino and Carib natives lived on the Puerto Rican islands. But the Spanish colonial period lasted for a little more than four centuries, during which the Spaniards created the racial, legal, political, and cultural composition of the Puerto Ricans.[42]

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[38] The Puerto Rican population of 3.9 million, discussed *infra* note 43 and accompanying text, far exceeds the populations of other island territories, which the 2000 Census found were as follows: American Samoa, 57,291; Guam, 154,805; the U.S. Virgin Islands, 108,612; and The Commonwealth of the Northern Mariana Islands (CNMI), 69,221. *United States Census 2000: The Island Areas*, U.S. CENSUS BUREAU, http://www.census.gov/population/www/cen2000/islandareas.html (last visited Mar. 15, 2010).

[39] *See* LEIBOWITZ, *supra* note 33, at 449-51 (though expressing some doubt about the matter, noting that American Samoans are treated as "non-citizen nationals" of the United States). The three so-called Free Associated States—The Republic of the Marshall Islands, the Federated States of Micronesia, and Palau—are members of the United Nations. *See Member States of the United Nations*, UNITED NATIONS WEBSITE, http://www.un.org/en/members/index.shtml (last visited Mar. 15, 2010). The Marshall Islands and the Federated States of Micronesia were admitted on September 17, 1991, and Palau was admitted on December 15, 1994. They have their own citizenship, independent from the United States. *See generally* LEIBOWITZ, *supra* note 33, at 639–703. As of July 2010, their populations are estimated, respectively, at 65,859, 107,154, and 20,879. *See The World Factbook*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/index.html (last visited Mar. 15, 2010).

[40] *See, e.g.*, Torres v. Puerto Rico, 442 U.S. 465 (1979), discussed *infra* section VI. *See also* MARGARET LEECH, IN THE DAYS OF MCKINLEY (1959).

[41] *See* 48 U.S.C. § 731 (2006) ("The provisions of this [Act] shall apply to the island of Puerto Rico and to the adjacent islands belonging to the United States and waters of

Puerto Rico is the most populous of the current island territories with current estimates placing the number of residents at 3,927,188, and was involved in most of the Insular Cases.[43] Other U.S. citizens have not moved to Puerto Rico in substantial numbers, however,[44] and Puerto Rico remains a culturally Latina/o island even after more than one hundred years of U.S. occupation. Puerto Ricans are one of the largest Latina/o groups in the United States. The 2000 Census also found 3,406,178 persons in the fifty states and the District of Columbia who identified themselves as "Hispanic or Latino" and specified "Puerto Rican" in their forms.[45] On July 13, 2009, the

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those islands; and the name Puerto Rico, as used in this [Act], shall be held to include not only the island of that name, but all the adjacent islands as aforesaid.").

[42] *See generally* AMERICA'S COLONY, *supra* note 1, at 49-116.

[43] According to the 2000 Census, Puerto Rico's population was 3,808,610. *United States Census 2000: Census 2000 Data for Puerto Rico*, U.S. CENSUS BUREAU, http://www.census.gov/census2000/states/pr.html (last visited Mar. 15, 2010). The estimate issued in 2010 is that the population has risen to 3,977,663. *The World Factbook, Central America and Caribbean: Puerto Rico*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/rq.html (last visited Mar. 15, 2010).

[44] According to the 2000 U.S. Census—which provides the most detailed information—more than 3.8 million persons live in Puerto Rico, of whom 98.8 percent describe themselves as "Hispanic or Latino" and 95.1 percent as "Puerto Rican." *DP-1. Profile of General Demographic Characteristics: 2000, Census 2000 Summary File 1*, U.S. CENSUS BUREAU, AMERICAN FACTFINDER, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US72&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U (last visited Mar. 15, 2010).

[45] *QT-P9. Hispanic or Latino by Type: 2000, Census 2000 Summary File 1*, U.S. CENSUS BUREAU, AMERICAN FACTFINDER, http://factfinder.census.gov/servlet/QTTable?

Pew Research Center reported that "4.1 million Puerto Ricans resided in the fifty U.S. states and the District of Columbia in 2007, according to the Census Bureau's American Community Survey."[46] For the first time, the Puerto Rican population in the states exceeds that of the island.

On the eve of the Spanish-American War in 1898, Puerto Rico and Cuba were the last outposts of Spain in the Americas.[47] The return of the Spanish Monarchy in 1814 meant the loss of Spanish citizenship and participation in the political process briefly granted by the 1812 *Constitución de Cádiz* (Constitution of Cadiz). White *cubanas/os* (Cubans) and *puertorriqueñas/os* were back to being subjects of Spain, but they were not its citizens.[48] In a process that had started with the revolution of September 1868 in Spain and continued with the new constitution of 1876,[49] the Spanish crown began to reconsider the legal regime governing the islands of Cuba and Puerto Rico. Article 89 of the Constitution of the Spanish Monarchy of 1876 gave the government the power to issue special legislation for the governance of the "*provincias del ultramar*" (the overseas provinces). Clause 2 of this article gave Cuba and Puerto Rico the right to be represented in the Cortes—the Spanish legislative body—once special legislation to that effect was approved. In a series of enactments, Cuba and Puerto Rico received increasing levels of home rule and the rights of Spanish citizens, but due to the turmoil in Spain, the constitutional

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_bm=y&-qr_name=DEC_2000_SF1_U_QTP9&-geo_id=01000US&-ds_name=DEC_2000_SF1_U&-redoLog=false (last visited Mar. 15, 2010).

[46] *A profile of Puerto Ricans*, PEW RESEARCH CENTER, http://pewresearch.org/pubs/1280/profile-puerto-ricans-living-in-us (last visited Mar. 15, 2010).

[47] The Spanish empire in the Americas was almost totally lost between 1821 and 1824, principally as a result of the Napoleonic invasion of the Iberian Peninsula. *See* JOSÉ TERRERO, HISTORIA DE ESPAÑA 456-58 (Juan Regla ed., Ramón Sopena 1971).

[48] *See generally* AMERICA'S COLONY, *supra* note 1, at 32-33 (generally describing the effect of the Napoleonic occupation on Spanish law and in particular that persons of African ancestry had to apply for citizenship and meet further requirements under the royal constitution).

[49] During the reign of Alfonso XII. *See* CONSTITUCIONES Y CÓDIGOS POLÍTICOS ESPAÑOLES, 1808–1978, at 145 (Julio Montero ed., Ariel 1998).

authorization was not implemented in earnest until 1895.[50] The reforms were more acceptable to the Puerto Ricans than to the Cubans. In the late 1890s, Luis Muñoz-Rivera, the leader of Puerto Rico's principal political group, the Autonomist Party, rejected plans for a military attack against the Spanish proposed by Puerto Rican pro-independence forces in exile in New York.[51]

As part of the autonomy process, Spanish citizenship was formally granted to the native-born inhabitants of Cuba and Puerto Rico in November 1897.[52] On November 25, 1897, Spain legislated the Charter of Autonomy for Puerto Rico. The Charter granted self-government by an elected lower chamber of the legislature, a partially elected and partially appointed upper legislative chamber, and an appointed high executive known as the governor-general.[53] A separate decree extended the civil rights guarantees of the 1876 Spanish constitution to apply to Puerto Rico.[54] The Charter of Autonomy set the stage for the final Spanish election in Puerto Rico.[55] Puerto Rico's Autonomist and Liberal Parties welcomed the Charter and elected the country's first homegrown government just weeks before the start of the Spanish-American War.[56] On July 17, 1898, the new local government was installed in San Juan.[57]

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[50] *See generally* ALFONSO L. GARCÍA-MARTÍNEZ, PUERTO RICO: LEYES FUNDAMENTALES 9–114 (Editorial Edil 1989).

[51] OLGA JIMÉNEZ DE WAGENHEIM, PUERTO RICO: AN INTERPRETIVE HISTORY FROM PRE-COLUMBIAN TIMES TO 1900, at 198-99 (1998). But in Cuba, General Máximo Gómez was still fighting the Spanish when the United States invaded Cuba in 1898.

[52] Article 1 of the Decree of 9 November 1897 gives Spanish citizenship, on an equal footing with residents of the Peninsula, to the Spanish subjects in the Antilles. *See* GARCÍA-MARTÍNEZ, *supra* note 50, at 93.

[53] *See Charter of Autonomy, 1897, in* 1 P.R. LAWS ANN., at 2 (2008).

[54] *See* 1 JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 128 (Universidad de Puerto Rico 1980) [hereinafter 1 HISTORIA CONSTITUCIONAL].

[55] FERNANDO BAYRON-TORO, ELECCIONES Y PARTIDOS POLÍTICOS DE PUERTO RICO 107 (4th ed., Isla 1989) (1977).

[56] It was an imperfect form of home rule, as the Spaniards retained the authority to appoint certain members of the upper chamber of the legislature and to set the eligibility requirements, which ensured that only the economically powerful classes would be allowed to run for office. The law required that candidates for office have "an annual income of four thousand pesos." *See Charter of Autonomy, 1897, in* 1 P.R. LAWS ANN., at 2-3 (2008). This was a lot in those days, when a teacher made 180 pesos a year and peasants made four-eights to seven-eights peso a day. *See generally* PEDRO MALAVET

The Charter of Autonomy proved unacceptable to the more stridently pro-independence Puerto Ricans exiled in New York, some of whom encouraged the United States to invade. In 1892, these exiles had founded the Borinquen Club, a pro-independence Puerto Rican group. After autonomist leaders in Puerto Rico rejected their call for revolution against Spain, officers of the club, which by then had changed its name to the Puerto Rico Section, met with Senator Henry Cabot Lodge in 1898 to ask the "United States government for help in evicting Spain from Puerto Rico."[58] The pro-independence *puertorriqueñas/os* in New York even provided interpreters and scouts for the U.S. Army. To be sure, many believed that the United States would quickly give Puerto Rico independence after the invasion, as it did with Cuba. What they clearly underestimated in both Puerto Rico and Cuba was how disruptive "America's" imperial dreams would be for both islands.[59] In July 1898, the *americanos* invaded, and the Autonomist experiment ended before Puerto Rico had a real chance, however limited, to rule itself.

Soon after the change in sovereignty, the former Pure and Orthodox Party became the pro-statehood Partido Republicano Puertorriqueño (Puerto Rican Republican Party). The party's organizers, which included José Celso Barbosa and Manuel F. Rossy, described their goals as "the definitive and sincere annexation of Puerto Rico to the United States. Declaration of organized territory for Puerto Rico, as a prelude thereafter to become a State of the Federal Union."[60] They favored accelerat-

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VEGA, HISTORIA DE LA CANCIÓN POPULAR EN PUERTO RICO (1493-1898), at 293, 351, 448–49, 505–08 (1992). On the monetary units in Spanish times, see FERNANDO PICÓ, HISTORIA GENERAL DE PUERTO RICO 9 (1986).

[57] BAYRON-TORO, *supra* note 55, at 129–39.

[58] *See* WAGENHEIM, *supra* note 51, at 198–99.

[59] Wagenheim notes, however, that Independence Leader Ramón Emeterio Betances, exiled in France, warned that "if the Puerto Ricans don't act fast after the Americans invade, the island will be an American colony forever." *See* WAGENHEIM, *supra* note 51, at 200 (footnotes omitted).

[60] *Manifiesto de los dirigentes de la agrupación de los puros ortodoxos dirigido al país invitando a la formación del partido republicano puertorriqueño, April 19, 1899, in* PUERTO RICO: CIEN AÑOS DE LUCHA POLÍTICA vol. 1-1, 259–62 (Reece B. Bothwell-González, ed., 1979) [hereinafter *Manifiesto*] (translation by the author).

ing the Americanization project (the process of educating the Puerto Ricans in English to become "Americans"), which, they hoped, would lead to statehood. Accordingly, in their original political manifesto, they supported English as the language of instruction, "in order to put the country ["*el país*" (*sic*), referring to Puerto Rico] in conditions more favorable soon to become a new State of the Federation."[61]

Luis Muñoz-Rivera continued to lead the Autonomist/Liberal Party, which also was undergoing a transformation after the invasion and became the Partido Federal Puertorriqueño (Puerto Rican Federal Party) in October 1899. Perhaps surprisingly, the party's first official program, or platform, supported the immediate grant of territorial status to Puerto Rico and eventual statehood.[62] But it also favored the absolute autonomy of the island's municipal governments to handle what the party called *asuntos locales* (local matters), especially education.[63] This put them in direct conflict with the U.S. administrators and with the Republican Party. On October 26, 1900, an editorial in *La Democracia*, the newspaper published by the party and edited by Muñoz-Rivera, criticized the U.S. administrators of Puerto Rico and the Republican Party and its political thugs.[64] The editorial ended with a call for withdrawal from the elections. Consequently, in 1900 the Federal Party boycotted the first election held under the U.S. regime.[65]

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[61] *Id.* at 261 (translation by the author).

[62] *Programa del Partido Federal, 1 de octobre de 1899*, *in* PUERTO RICO: CIEN AÑOS DE LUCHA POLÍTICA vol. 1-1, 271-72 (Reece B. Bothwell-González, ed., 1979) [hereinafter *Programa*]. In February 1904, the Federal Party dissolved itself and was reconstituted as the *Partido Unión de Puerto Rico* (Union Party of Puerto Rico). The party again included among its principal leaders the autonomist Luis Muñoz-Rivera, the Autonomist Party founder and now independence leader Rosendo Matienzo-Cintrón, and another prominent independence supporter, José de Diego. Again displaying the colonial political pragmatism recognizing strength in numbers, the party also included statehood supporters. Its name was specifically chosen to describe the intent to unify the party members' diverse political views regarding status. The official minutes of the convention can be found in PUERTO RICO: CIEN AÑOS DE LUCHA POLÍTICA vol. 1-1, 282-85 (Reece B. Bothwell-González, ed., 1979).

[63] Item 6 in their official "program." *Programa*, *supra* note 62, at 271-72.

[64] "El Retraimiento," *La Democracia*, October 26, 1900, *in* PUERTO RICO: CIEN AÑOS DE LUCHA POLÍTICA vol. 1-1, 273–74 (Reece B. Bothwell-González, ed., 1979).

Native political thinking and organizing had developed greatly during the nineteenth century in Puerto Rico, so that when the United States arrived it found an elite of sophisticated politicians and parties ready to support, challenge, and oppose the new sovereign. The future of the Puerto Ricans, however, would not be determined in their local elections; it would be decided by their new sovereign, and initially, by the U.S. Supreme Court.

IV. THE UNITED STATES IN 1901: IN THE AFTERGLOW OF THE SPANISH-AMERICAN WAR

Victory in the Spanish-American War left the United States in effective control of its new island empire. Militarily, but more importantly legally and politically, the United States found itself at a crossroads. The Spanish-American War and the *Downes* ruling brought to an end the age of Northwest Ordinances and Jacksonian Manifest Destiny[66] as the prevailing theory of territorial expansion of the United States, in favor of a new colonial paradigm. In the aftermath of the war and U.S. takeover of Puerto Rico, the Philippines, Guam and Cuba, the Supreme Court gave constitutional approval to the acquisition and control of territory for the sake of legal, political and military control of the islands rather than for national territorial expansion, accompanied by "immigration and settlement" by persons who were already citizens of the United States, and acceptable American stock.[67]

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[65] For a discussion of the election results, BAYRON-TORO, *supra* note 55, at 115–16, 120–21.

[66] By this I mean the phrase as it was first used by Democrats aligned with President Andrew Jackson, who favored the incorporation of the Oregon territories, Texas and the spoils of the Mexican-American War into the United States, eventually as states of the union. More generally, as it was used to justify expansion of the United States, again through statehood, from the Atlantic to the Pacific. I am not using it in the sense that mostly-Republican "expansionists" of the late 1890s and early twentieth century used it, since I prefer the clarity and distinguishing ability of the imperialism discourse, especially as it occurred around the elections of 1896, 1900 and 1904. *See generally* JULIUS W. PRATT, EXPANSIONISTS OF 1898: THE ACQUISITION OF HAWAII AND THE SPANISH ISLANDS 1-33 (3d ed., Quadrangle Books 1964) (1936) (chapter entitled *The New Manifest Destiny* contrasts territorial expansion of the early nineteenth century U.S., mostly associated with Democrats, with the late 19th Century overseas expansionism advocated mostly by the Republicans). *See also* ZIMMERMANN, *supra* note 9, at 13 (noting that most politicians who favored it avoided the term "imperialism" and barely tolerated "expansionism").

Theodore Roosevelt called this "Americanism;" Henry Cabot Lodge labeled it the "large policy." But it was imperialism, which the principal architect of America's naval doctrine at the time, Alfred T. Mahan, labeled as such and defined as "'the extension of national authority over alien communities.' This broader definition implies that a country does not have to own the territory of an alien community in order to exercise imperial authority over it."[68] Mahan criticized the shortcomings of the Spanish, French and Dutch imperial projects, while expressing his admiration for the English empire; he disposed of the irony of the American War of Independence *from Great Britain* as follows: "Since she lost what is now the United States, Great Britain has become benevolent and beneficent to her colonies."[69]

Behind the political debate over territorial expansion was a professional debate over military doctrine. The one that prevailed deemed naval power the most important way to project military and political authority abroad, and this was seen as essential to being a strong player in international political and economic affairs, as well as the best way to ensure the security of the United States. No one influenced this thinking more in favor of the projection of naval power than Mahan, a graduate of the U.S. Naval Academy at Annapolis and commissioned naval officer. He became president of the Naval War College, reportedly much to the chagrin of Annapolis and Navy authorities, in 1886. It was there that he developed as a scholar familiar with naval history, and where he developed a new vision of American naval doctrine. This doctrine was driven by the need to project American power abroad. It required a large navy, with large capital ships, a canal in Panama, and the ability to maintain naval coaling stations throughout the world, but most especially in the Atlantic and Pacific oceans.[70] Mahan concluded that the "triumphs and the sufferings of the past months [referring to combat operations in the Spanish-American War] have drawn men's eyes to the necessity for increase of force, not merely to sustain over-sea dominion, but also to ensure timely use, in action, of the latent military and naval strength which the nation possesses."[71] Mahan was clearly a good scholar and a prolific writer, and his books and magazine articles became highly influential in political circles in Washington.[72] Two particularly important admirers were Massachusetts Senator Henry Cabot Lodge and future President Theodore Roosevelt.[73]

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[67] *See generally* Balzac v. Porto Rico, 258 U.S. 298 (1922), discussed *infra* Part VI.

[68] ZIMMERMANN, *supra* note 9, at 13.

[69] ALFRED T. MAHAN, *The Relations of the United States to their New Dependencies, in* LESSONS OF THE WAR WITH SPAIN, AND OTHER ARTICLES 241, 243 (Boston, Little, Brown, & Co. 1899).

The war targeted the last Spanish island colonies in the Caribbean and Pacific oceans. In President William McKinley's instructions to the U.S. delegation that negotiated the Treaty of Paris, the only full territory that he ordered them to demand from the Spanish was the islands of Puerto Rico.[74] Although the islands were important to the United States for military and economic reasons, their principal attraction was their strategic location when the Spanish-American War broke out. Indeed, the acquisition of Puerto Rico was contemplated from the very conception of the new "American empire" by two of its principal architects:

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[70] *See generally* ZIMMERMANN, *supra* note 9, at 85-122 (chapter 3, referring to Mahan as a "pen-and-ink sailor").

[71] MAHAN, *supra* note 69, at 251.

[72] *See, e.g.*, A. T. MAHAN, SOME NEGLECTED ASPECTS OF WAR (Little, Brown Co. 1907), *reprinted as* UNILATERAL FORCE IN INTERNATIONAL RELATIONS (Garland 1972). Mahan's best-known work is THE INFLUENCE OF SEA POWER UPON HISTORY, 1660-1783 (12th ed., Boston, Little, Brown, & Co. 1890). He also published extensively in magazines of the time. In his preface to another of his more important books, THE INTEREST OF AMERICA IN SEA POWER, PRESENT AND FUTURE, he stated: "The thanks of the author are expressed to the proprietors of the 'Atlantic Monthly,' of the 'Forum,' of the 'North American Review,' and of 'Harper's New Monthly Magazine,' who have kindly permitted the republication of the articles originally contributed to their pages." ALFRED T. MAHAN, *Preface* to THE INTEREST OF AMERICA IN SEA POWER, PRESENT AND FUTURE (Books for Libraries 1970) (1897). Both books are available in electronic form, at RIA PRESS CLASSIC BOOKS, http://www.riapress.com/riapress/index.lasso (last visited Mar. 15, 2010).

[73] Mahan and Roosevelt met at a critical time. In 1887, Mahan invited Roosevelt to lecture at the War College on the War of 1812, which Roosevelt had studied while a student at Harvard. *See* ZIMMERMANN, *supra* note 9, at 92.

[74] *Instructions of the President to the United States Peace Commissioners*, *in* PAPERS RELATING TO THE TREATY WITH SPAIN, S. DOC. NO. 148, at 3-4 (1901). These papers initially were secret, but on February 5, 1901, the Senate lifted the "injunction

> Assistant Secretary of the Navy Theodore Roosevelt, in a personal letter to Senator Henry Cabot Lodge, wrote: ". . . do not make peace until we get Porto Rico." Lodge replied: "Porto Rico *is not forgotten and we mean to have it.* Unless I am utterly . . . mistaken, the administration is now fully committed to the large policy that we both desire."[75]

The strategic importance of Puerto Rico, correctly spelled, was noted and explained by Mahan in his work *Lessons of the War with Spain*, published in 1899.[76] Mahan sums up the "military importance of Puerto Rico" as follows:

> Puerto Rico, considered militarily, is to Cuba, to the future Isthmian canal, and to our Pacific coast, what Malta is, or may be, to Egypt and the beyond; and there is for us the like necessity to hold and strengthen the one, in its entirety and in its immediate surroundings, that there is for Great Britain to hold the other for the security of her position in Egypt, for her use of the Suez Canal, and for the control of the route to India. . . . It would be very difficult for a transatlantic state to maintain operations in the western Caribbean with a United States fleet based upon Puerto Rico and the adjacent islands . . . [provided that island bases be accompanied by] adequate naval strength, without which no maritime position possesses value.[77]

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of secrecy" and ordered the publication of three thousand volumes. *Id.* at 1. I state "full" territory because the U.S. did demand the cession of individual islands in the Ladrones and Philippine archipelagoes. *Id.* at 4, 7 (Guam in the Ladrones and Luzón in the Philippines).

[75] THE PUERTO RICANS: A DOCUMENTARY HISTORY 89 (Kal Wagenheim and Olga Jiménez de Wagenheim eds., 4th ed. 2008) (emphasis added).

[76] MAHAN, *supra* note 69.

[77] *Id.* at 29-30.

The war itself began after an ultimatum of sorts. On April 19, 1898, the U.S. Congress passed a joint resolution authorizing the president to use force if Spain "failed to pacify Cuba."[78] On April 25, 1898, Congress declared war, retroactive to April 21, 1898, because on that date the U.S. warship *Nashville* had captured the Spanish ship *Buenaventura*.[79] U.S. troops landed in Guánica, Puerto Rico, on July 25, 1898, while a naval force blockaded San Juan harbor.[80] Although the campaign cannot be described as long or especially bloody, young men on both sides died and those who lived did so in fear. In his diary, a Puerto Rican-born gunnery officer in the Spanish army recounted the agonizing wait to be attacked in San Juan, when they already knew that U.S. troops had landed in the south and were marching north. They also were well aware of the presence of American warships offshore. Indeed, the wait proved too stressful for two of the gunnery officer's comrades, who attempted suicide. One of the U.S. soldiers, the poet Carl Sandburg, recounts his own deep fear of being attacked during the first night after his unit landed in Guánica. The only shots he heard, however, were fired by a unit from Illinois that apparently panicked during the night, firing so wildly that they hit the transport carrying the task force commander, several Red Cross nurses, and, presumably, fellow soldiers.[81]

The Spanish forces in Puerto Rico did not put up much of a fight. The guns of San Juan had not been fired in hostilities since they repelled the British invasion in 1797, and they had not been upgraded since then. The United States quickly captured the island. U.S. forces took Ponce, the largest city in the South of the island, on July 28, without firing a shot. On this date, Major General Nelson Miles issued a proclamation announcing:

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[78] President William McKinley signed the resolution on April 20. On April 21, the U.S. ambassador to Spain delivered an ultimatum to the Spanish government, giving it until noon on April 23, 1898, to pacify Cuba or leave. ANGEL RIVERO, CRÓNICA DE LA GUERRA HISPANOAMERICANA EN PUERTO RICO 18–24 (1971).

[79] *Id.*

[80] Rivero provides a critical analysis of the campaign and the tactics in his book, CRÓNICA DE LA GUERRA HISPANOAMERICANA EN PUERTO RICO on pages 522–23. RIVERO, *supra* note 78, 522-23.

[81] THE PUERTO RICANS, *supra* note 75, at 96–97, 99–103. Among the U.S. troops that landed in Guánica was the poet Carl Sandburg. His account of the landing and the Puerto Rico campaign can be found in his autobiography. *See generally* CARL SANDBURG, ALWAYS THE YOUNG STRANGERS (1953). The excerpts referring to the Puerto Rico campaign are quoted in THE PUERTO RICANS, *supra* note 75, at 96–98.

> To the inhabitants of Puerto Rico: In the prosecution of the war against the Kingdom of Spain by the people of the United States, in the cause of liberty, justice, and humanity, its military forces have come to occupy the Island of Porto Rico. . . . They bring you the fostering arm of a nation of free people, whose greatest power is in its justice and humanity to all those living within its folds.
>
> The chief object of the American military forces will be to overthrow the armed authority of Spain and to give to the people of your beautiful island the largest measure of liberty consistent with this military occupation. . . . [We have] come to bring protection, not only to yourselves but to your property, to promote your prosperity and bestow upon you the immunities and blessings of the liberal institutions of our government . . . .[82]

In the Puerto Rico campaign, 17 Spanish soldiers were killed, 88 were wounded, and 324 were taken prisoner. For the United States, three soldiers were killed and forty were wounded, mostly by Puerto Rican irregular troops.[83]

By August 12, 1898, the United States had ended its military operations in Puerto Rico, and on September 14, 1898, most of the remaining Spanish troops left the island. October 18 was the final day for the official surrender of San Juan to the U.S. troops, and the last few Spanish soldiers sailed aboard the warship *Montevideo* on October 23.[84] The second colony had begun.

The Treaty of Paris, signed on December 10, 1898, approved by the U.S. Senate, and ratified by the president in

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[82] RAYMOND CARR, PUERTO RICO: A COLONIAL EXPERIMENT 31 (1984).

[83] HÉCTOR ANDRÉS NEGRONI, HISTORIA MILITAR DE PUERTO RICO 340 ([Spain]: Sociedad Estatal Quinto Centenario, 1992); CARR, *supra* note 82, at 28.

[84] THE PUERTO RICANS, *supra* note 75, at 102–03.

1899, officially ended the Spanish-American War, with the island of Puerto Rico as the United States' prize.[85]

The national election of November 1900—won by "Imperialist" McKinley over "anti-Imperialist" William Jennings Bryan—was preceded by a heated political debate over what to do with the new territorial possessions. The Democratic Party platform denounced Republican "imperialism" and "militarism":

> We declare again that all governments instituted among men derive their just powers from the consent of the governed; that any government not based upon the consent of the governed is a tyranny; and that to impose upon any people a government of force is to substitute the methods of imperialism for those of a republic.
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> We hold that the Constitution follows the flag, and denounce the doctrine that an Executive or Congress deriving their existence and their powers from the Constitution can exercise lawful authority beyond it or in violation of it. We assert that no nation can long endure half republic and half empire, and we warn the American people that imperialism abroad will lead quickly and inevitably to despotism at home.
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> . . . .
>
> We oppose militarism. It means conquest abroad and intimidation and oppression at home. . . . We denounce it as un-American, un-Democratic, and un-Republican, and as a subversion of the ancient and fixed principles of a free people.[86]

The Republicans were clearly happy with the results of the Spanish-American War and embraced the notion of territorial expansion. Their platform hailed the acquisition of American Samoa, favored the annexation of Hawaii, "home rule for, and the early admission to statehood of the Territories of New Mexico, Arizona, and Oklahoma."[87] But President McKinley and many in his party bristled at the Democrats' charge that his policies were imperialist and militaristic. The Republican platform generally defended the Spanish-American War and justified it as "liberation" of the island peoples:

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[85] The official title is the "Treaty of Peace between the United States of America and the Kingdom of Spain." *See Treaty of Paris, 1898*, *in* 1 P.R. LAWS ANN., at 16 (2008). *See also* PEREA ET AL., *supra* note 5, at 327. Article II of the Treaty reads: "Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones." PEREA ET AL., *supra* note 5, at 327. The editors of the Puerto Rican legal collection changed the references to "Porto Rico" included in the original English to "Puerto Rico." *See* 1 P.R. LAWS ANN., at 17.

[86] *Democratic Party Platform of 1900: July 4, 1900*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29587 (last visited Mar. 15, 2010).

> In accepting by the Treaty of Paris the just responsibility of our victories in the Spanish war, the President and the Senate won the undoubted approval of the American people. No other course was possible than to destroy Spain's sovereignty throughout the West Indies and in the Philippine Islands. That course created our responsibility before the world, and with the unorganized population whom our intervention had freed from Spain, to provide for the maintenance of law and order, and for the establishment of good government and for the performance of international obligations. Our authority could not be less than our responsibility; and wherever sovereign rights were extended it became the high duty of the Government to maintain its authority, to put down armed insurrection and to confer the blessings of liberty and civilization upon all the rescued peoples.[88]

The President and candidate for reelection had to express his views in more detail in his acceptance of the nomination and his campaign speeches because the platform, despite high-level discussions on the subject, failed to include already approved plank language explaining the Republican position on "[t]he constitutional relationship of the new possessions—not yet decided by the Supreme Court, and an inevitable campaign issue."[89] McKinley argued that it was up to Congress to decide the status of the island territories, while emphasizing that our intentions towards them were benevolent:

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[87] *Republican Party Platform of 1900: June 19, 1900*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29630 (last visited Mar. 15, 2010).

[88] *Id.*

[89] LEECH, *supra* note 40, at 542. *See also* ZIMMERMANN, *supra* note 9, at 393 (noting that "Bryan made 'imperialism' the primary issue of his campaign").

> We reassert the early principle of the Republican Party, sustained by unbroken judicial precedents, that the Representatives of the people in Congress assembled have full legislative power over territory belonging to the United States, subject to the fundamental safeguards of liberty, justice, and personal rights, and are vested with ample authority to act "for the highest interests of our Nation and the people intrusted to its care." This doctrine, first proclaimed in the cause of freedom, will never be used as a weapon for oppression. I am glad to be assured by you that what we have done in the Far East has the approval of the country.
>
> . . . .
>
> The Republican Party was dedicated to freedom forty-four years ago. It has been the party of liberty and emancipation from that hour; not of profession, but of performance. It broke the shackles of 4,000,000 slaves and made them free, and to the party of Lincoln has come another supreme opportunity, which it has bravely met in the liberation of 10,000,000 of the human family from the yoke of imperialism.[90]

McKinley was attempting to remind the nation of the debate at the time of *Scott v. Sanford*, discussed further in Part VI below, when the Republicans had argued that not all provisions of the Constitution should apply in the territories, in order to prevent the application therein of the constitutional language intended to protect the obscenity of slavery.[91] But the Democrats pointed out that slavery was gone, and we were now faced with a new island empire.

On the night of November 6, 1900, the Republicans won an overwhelming victory, earning 292 of 447 electoral votes and a majority of the popular vote.[92] Between the time of his reelection and his assassination at the end of 1901, McKinley finished the takeover of the island territories, including, though somewhat reluctantly, the Philippines.[93] Controlling and governing the new territorial possessions were major priorities of McKinley's administration starting in late 1898. His last three State of the Union Addresses, delivered, respectively, in December of 1898, 1899 and 1900, were principally focused on the results of the Spanish-American War and the affairs of the new insular possessions.[94] The insurgency in the Philippines was the primary topic of discussion, the development of home rule for Puerto Rico, and the transition to a "free" Cuban constitution were the other major topics regarding the territories covered by the President in trying to set executive and congressional priorities.[95]

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[90] William McKinley, *Address Accepting the Republican Presidential Nomination: July 12, 1900*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=76197 (last visited Mar. 15, 2010).

[91] *See infra* notes 175-77 and accompanying text.

[92] LEECH, *supra* note 40, at 559.

Between September 1898 and April 12, 1900, Puerto Rico was under military rule supervised by the War Department.[96] In the fall of 1900, President McKinley and his administration had a strong interest in the Supreme Court cases that would define our constitutional authority over the newly conquered territories.

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[93] ZIMMERMANN, *supra* note 9, at 316 (discussing McKinley as a reluctant imperialist, especially about the Philippines), 401-02 ("[O]n September 6, 1901, President McKinley was shot . . . at the mammoth Pan-American Exposition in Buffalo. . . . and he died on September 14 [1901].").

[94] *See generally* William McKinley, *Second Annual Message: Dec. 5, 1898*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29539 (last visited Mar. 15, 2010); William McKinley, *Third Annual Message, Dec. 5, 1899*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29540 (last visited Mar. 15, 2010); William McKinley, *Fourth Annual Message: Dec. 3, 1900*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29541 (last visited Mar. 15, 2010).

[95] *See id.*

[96] April 12, 1900, was the effective date of the first law passed by the U.S. Congress creating a civilian government for Puerto Rico. The law, known as the Foraker Act is discussed further *infra* notes 117-28 and accompanying text. On the period of military rule, see generally RAÚL SERRANO GEYLS, DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO 439-42 (1986); CARMEN RAMOS DE SANTIAGO, EL GOBIERNO DE PUERTO RICO 55–60 (1976). *See also* CARR, *supra* note 82, at 32-33. The early period of American rule in Puerto Rico was a bit messy. *See* AMERICA'S COLONY, *supra* note 1, at 57-60 (discussing the early period of American occupation). For an interesting description of the period, see LEIBOWITZ, *supra* note 33, at 140-41. *See also* discussion *infra* note 108 and accompanying text.

V. MR. BIDWELL AND THE 576 BOXES OF ORANGES

Downes v. Bidwell is the principal decision of the nine Insular Cases of the 1900 term.[97] Most of the lawsuits involved the collection of taxes and tariffs on Puerto Rican agricultural products brought to the United States. But the cases necessarily raised questions of the meaning of citizenship and how the American Constitution would be applied to the new island territories.

Taxes, crops and citizenship were important themes in Puerto Rico in 1901. The island was still reeling not so much from the Spanish-American War, as from the storm islanders call "San Ciriaco" (Saint Cyril), which hit Puerto Rico on Tuesday, August 8, 1899. This tropical cyclone "caused 3,369 deaths and more than 2,000 injuries; damages to property were estimated at more than thirty five million dollars. Crops and farms . . . were devastated. . . . Hunger and disease were rampant."[98] A popular *seis,* the music of Puerto Rican farm laborers of the time, blamed American racism and taxes for the post-war and post-storm suffering of the Puerto Ricans. After bemoaning the loss of the coffee crop (one of the most important crops in Puerto Rico at the turn of the twentieth century), the verses blame the Americans: "I am, man, convinced/ that the bad situation/ does not depend on the cyclone/ as many have believed./ The Yanqui's fault has been/ that he hates us a lot, a lot;/ and if what I hear is true,/ when they collect the tax/ ¡how dangerous this is!/ we are ¡really bad off, *Perucho*!"[99] The song goes on to blame the "absorbent [*yanqui*] race" for "not being able to take" the Puerto Ricans.

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[97] (1) Downes v. Bidwell, 182 U.S. 244, 287 (1901) (5-4 ruling; interpreting the first organic act passed by Congress to regulate Puerto Rico, ruled: "We are therefore of the opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution. . . ."); (2) De Lima v. Bidwell, 182 U.S. 1 (1901) (5-4 ruling; as a result of the Treaty of Paris, Puerto Rico is an island territory not a foreign country within meaning of U.S. tariff laws); (3) Goetze v. United States, 182 U.S. 221 (1901); (4) Crossman v. United States, 182 U.S. 221, 222 (referred to as "the Hawaiian case"; resolved summarily with *Goetze*, citing *De Lima* as controlling: neither "Port Rico [nor] the Hawaiian islands were foreign countries within the meaning of the [U.S.] tariff law . . ."); (5) Dooley v. United States, 182 U.S. 222, 235 (1901) (referred to as "Dooley I"; stating that after the Treaty of Paris, Puerto Rico was no longer subject to U.S. tariffs); (6) Armstrong v. United States, 182 U.S. 243, 244 (1901) (duties imposed after signing of Treaty of Paris not properly executed); (7) Huus v. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901) (unanimous decision holding that ship traveling from San Juan to New York engaged in domestic "coasting trade" under U.S. law); (8) Dooley v. United States, 183 U.S. 151 (1901) (referred to as "Dooley II"; 5-4 along the voting lines of *Downes*; ruled that Foraker Act taxes on Puerto Rican imports were constitutionally imposed); (9) The Diamond Rings, 183 U.S. 176 (1901) (referred to as "the Philippines case;" 5-4, with Brown again the deciding vote with Fuller, Harlan, Brewer, and Peckham in the majority citing *De Lima* that the Philippines by virtue of the Treaty of Paris ceased to be a "foreign country" for purposes of U.S. tariff laws; and Gray, White, Shiras, and McKenna in dissent).

[98] PEDRO MALAVET VEGA, DE LAS BANDAS AL TRÍO BORINQUEN (1900-1927), at 36-37 (2002) (translation by the author) [hereinafter DE LAS BANDAS].

The Insular Cases were so important in their day that the filing of the briefs was widely reported,[100] oral argument occurred over a period of ten days, and the resulting opinions occupy hundreds of pages and over two volumes of the U.S. Reports for the October Term of 1900 (numbers 182 and 183). In the midst of the litigation of the cases at the Supreme Court level, a fight erupted in the U.S. Senate over the nomination of Justice Harlan's son to be Attorney General of Puerto Rico. He was finally confirmed on May 21, 1901, just before the Insular Cases were decided with his father as one of the dissenters against the administration position.[101] Soon after the cases were decided, the 56th Congress ordered a reprinting of the parties' written briefs and transcription of oral arguments into a volume which the Supreme Court reports note—with some sense of awe—"amounted to 1075 pages."[102]

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[99] De Las Bandas, *supra* note 98, at 37. Malavet Vega notes that the song was published in the labor newspaper El Pan del Pobre (the Poor Man's Bread), on 25 August 1901. *Id.* at 115 n.13. The original Spanish lyrics are: Estoy, chico, convencido/ que la mala situación/ no depende del ciclón/ como muchos han creído./ La culpa del yanqui ha sido/ que nos odia mucho, mucho/ y si es cierto lo que escucho,/ cuando cobren el impuesto,/ ¡qué peligroso está esto!/ ¡qué mal estamos, Perucho! *Id.* at 37.

[100] *See, e.g.*, *Held Over By Supreme Court: Cases Involving Question Whether Porto Rico and Philippines Are Part of United States Postponed*, N.Y. Times, Nov. 13, 1900, at 8.

[101] *See Fight on Harlan Nomination: Senators Foraker and Pettigrew Get Into a Heated Argument—Confirmation Again Delayed,* N.Y. Times, Jan. 17, 1901, at 5 (soon after oral argument was heard on *Downes*); *see also Acts on Harlan Nomination*, N.Y. Times, Jan. 22, 1901, at 7 ("The Senate in executive session to-day confirmed the nomination of James S. Harlan to be Attorney General of Porto Rico. The final vote was reached after a discussion of more than two hours' duration, and when announced stood 43 to 21 in favor of confirmation.").

May 27, 1901 was to be the last day of the term, but the reading of the opinions in the Insular Cases took about five hours, forcing the Court to reconvene the next day.[103] The opinions were read in the "Old Senate Chamber," where the Court held sessions between 1860 and 1935, when its current building was completed.[104] "The small courtroom was crowded to repletion throughout the day, prominent government officials and many attorneys being present, and the proceedings were followed from start to finish with keen interest."[105] The Washington Post and the New York Times ran front-page articles reporting on the decisions, noting that one of the government dignitaries was Secretary of War Elihu Root.[106]

Elihu Root was a successful New York corporate lawyer when he was selected for the position of Secretary of War by President McKinley, not because of his non-existent military experience, but rather because he was a lawyer. His initial reaction to receiving the job offer over the "newfangled telephone" was to reply: "Thank the President for me . . . but say that it is quite absurd. I know nothing about war, I know nothing about the army."[107] The reply he received illustrates why he is such an important figure in understanding the Insular Cases:

> President McKinley directs me to say[] that he is not looking for any one who knows anything about war or for any one who

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[102] De Lima v. Bidwell, 182 U.S. 1, 3 (1901); 56th Congress, H.R. 72; THE INSULAR CASES, COMPRISING THE RECORDS, BRIEFS, AND ARGUMENTS OF COUNSEL IN THE INSULAR CASES OF THE OCTOBER TERM, 1900, IN THE SUPREME COURT OF THE UNITED STATES, INCLUDING THE APPENDIXES THERETO (Gov't Printing Office 1901).

[103] Special, *Court Decides Insular Cases: Holds that the Foraker Act Is Constitutional*, N.Y. TIMES, May 28, 1901, at 1.

[104] *History of the Court: Home of the Court*, THE SUPREME COURT HISTORICAL SOCIETY, http://www.supremecourthistory.org/history/supremecourthistory_history_homes.htm (last visited Mar. 15, 2010).

[105] *Court Decides Insular Cases: Holds that the Foraker Act Is Constitutional*, *supra* note 103, at A1.

[106] *See The Status of Our Insular Possessions*, WASH. POST, May 28, 1901, at 1; *see also supra* note 103 and accompanying text.

[107] LEECH, *supra* note 40, at 379.

> knows anything about the army; he has got to have a lawyer to direct the government of these Spanish islands, and you are the lawyer he wants.[108]

The Insular Possessions were regulated through the War Department between 1898 and 1934, when that responsibility was shifted to the Department of the Interior.[109] This Secretary of War was therefore an interested and quite knowledgeable listener as the opinions were read.[110]

In the first opinion to be read, *De Lima v. Bidwell*, the U.S. Supreme Court ruled that for the purpose of imposing import tariffs in the United States, Puerto Rico was not a foreign country but rather a U.S. territory. [111] Specifically, Justice Brown—speaking for himself, Chief Justice Fuller, Justices Harlan, Brewer and Peckham—wrote that "by the ratification of the Treaty of Paris the island became territory of the United States, *although not an organized territory in the technical sense of the word*."[112] Therefore, sugar from Puerto Rico was not "imported merchandise" under the general tariff laws of the United States, as amended by the Customs Administrative Act of 1890,[113] because the tariffs in those laws applied only to imports from foreign countries. Bidwell, the collector of taxes at the port of New York, lacked the authority to levy tariffs on Puerto Rican products under that law. Accordingly, "duties [on sugar imported from Puerto Rico] were illegally exacted, and . . . the plaintiffs [were] entitled to recover them back."[114]

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[108] *Id. See also* ZIMMERMANN, *supra* note 9, at 147-48 (recounting the same story).

[109] Between 1898 and 1934, Puerto Rico was governed through the War Department. That responsibility was shifted to the Department of the Interior, effective May 1934, where it remained until 1952. *See* JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 58 (1997) (this text incorrectly gives 1933 as the date, which is probably a typographical error since in his more detailed collection, and in his original source, it indicates 1934); 2 JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 206-14 (1981) (discussing the transfer of authority to the Department of the Interior).

[110] His attendance prompted the exchange discussed *supra* note 1. *See* 1 PHILIP C. JESSUP, ELIHU ROOT, 1845-1090, at 348 (Dodd, Mead & Co. 1938) (referring to the famous cite quoting DUNN, *supra* note 1, at 257). This book also contains an interesting analysis of the correspondence and discussion between Root, then Secretary of State John Hay and President McKinley on the subject of the territories, concluding that "Root did not trust Congress to do an efficient job in mapping out a form of colonial government [for the insular possessions]." *Id.* at 348. Shortly before his assassination, McKinley expressed his intention to create a bureau in the Department of State to deal with the insular possessions. On September, 14, 1901, Root wrote Hay to express his support for the "Bureau of Insular Affairs" at the Department of State because supervision of the insular governments "can go where it belongs under civil control in the nearest approach we can make to a Department of Colonial Affairs." *Id.* at 350. Root became Secretary of State in the administration of Theodore Roosevelt, and it is in that capacity that he visited Puerto Rico starting on July 8, 1906, during his "South American Trip." *Id.* at 468-92 (detailing and contextualizing this long voyage). He was entertained at the Governor's mansion, *La Fortaleza*, by the Puerto Rican Police band, directed by Francisco Verar. *See* DE LAS BANDAS, *supra* note 98, at 65, 81.

[111] De Lima v. Bidwell, 182 U.S. 1 (1901). The Court narrowly construed the question presented in the case: "This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a 'foreign country' within the meaning of the tariff laws." *Id.* at 174.

But anticipating here in dissent what he would later join in concurring in *Downes*, Justice McKenna—speaking for himself and Justices White and Shiras—indicated that the status of Puerto Rico represented "a relation to the United States between that of being a foreign country absolutely and of being domestic territory absolutely."[115] Where the majority had seen only the categories of (a) foreign countries and (b) domestic territories, the dissenters saw (a) "foreign countr[ies]," such as Spain and its possessions, (b) "domestic territory[,] as New York now is," and (c) "[b]etween these extremes there are other relations, and that Porto Rico occupied one of them."[116] The majority does make the brief descriptive distinction between U.S. territories that are "organized" and those that are "not organized." But, as their votes in *Downes* make clear, four of the five members of that majority (Fuller, Harlan, Brewer and Peckham) did not intend that distinction to have constitutional significance in determining the civil rights of the territorial citizens or the constitutional limitations on the power of congress and president to rule them.

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[112] *Id.* at 196 (emphasis added). Justice Brown delivered the opinion of the Court, which was joined by Chief Justice Fuller, and Justices Harlan, Brewer and Peckham.

[113] Ch. 407, 26 Stat. 131 (discussed by the Court in *De Lima*, 182 U.S. at 175).

[114] *De Lima*, 182 U.S. at 200. I have ignored other issues addressed by the Court in this removal action, especially the jurisdictional and remedy questions, because they are not pertinent here. But anyone interested in the statutory limitations on the Court's jurisdiction or on remedies available for governmental misapplication of statutes will find parts of the majority opinion of interest.

[115] *Id.* at 220 (McKenna, J., dissenting).

[116] *Id.* at 200-01.

De Lima was immediately eclipsed by the reading of the *Downes* decision, because it interpreted the Foraker Act of April 12, 1900, making *Downes* the most important of the Insular Cases. The facts in *De Lima* occurred in the fall of 1899, before passage of the Foraker Act.[117] The Foraker Act, in providing for a government for Puerto Rico, turned it into an "organized" territory, i.e., one that is subject to a congressional organic statute. Therefore, the Supreme Court would be faced with the question of what constitutional rights are applicable in any territory subject to U.S. sovereignty that was not yet a state.

The Act—named after the very powerful Republican Senator from Ohio, Joseph Benson Foraker—authorized a U.S.-appointed civilian government to be established on the island, and its chief executive, the governor, would be named by the president of the United States.[118] The president also appointed the members of the cabinet, known as the Executive Council, who also acted as the upper legislative house. The lower house of thirty-five delegates was elected by the people of Puerto Rico. The chief justice and associate justices of the island's supreme court were to be appointed by the president of the United States. The Act created the Federal District Court for Puerto Rico.[119] This regime lasted until 1917 when it was replaced by the Jones Act, which led to the *Balzac* decision discussed in the next section.[120]

During discussion of the Foraker Bill, the U.S. Senate changed references to "Puerto Rico" contained in the original draft with "Porto Rico," and that denomination was used in the final proposal and was only changed by law in 1932.[121] A defense of the new spelling of the island's name in the law strikes a modern reader as a concession to underachieving:

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[117] *Id.* at 2 (majority opinion).

[118] *See* Foraker Act, ch. 191, 31 Stat. 77 (1900), *codified as amended in* 48 U.S.C. (2006) (various sections), *and in* 1 P.R. LAWS ANN., at 24-48 (2008). *See also* 1 P.R. LAWS ANN., at 36-37.

[119] *See generally Foraker Act, in* 1 P.R. LAWS ANN., at 33-34, 36-39, 42-44 (2008). The Executive Council is argued to have been the most important element in the process of "Americanizing" Puerto Rico. *See* PEDRO A. CABÁN, CONSTRUCTING A COLONIAL PEOPLE: PUERTO RICO AND THE UNITED STATES, 1898-1932, at 122-26 (1999).

[120] *See* Jones Act, ch. 145, 39 Stat. 951, 953 (1917), *and in* 1 P.R. LAWS ANN., at 52 (2008).

> A Senate Committee has decided that "Porto Rico" is the proper spelling of our new island territory, and not "Puerto Rico," after the local and Spanish usage. The spelling adopted by the committee ought to prevail. It is the easiest and simplest form and in accordance with common-sense principles. Whenever an opportunity presents itself, as in this case, to choose between a phonetic form of spelling and an intricate or more involved form, the former ought always to be adopted. Silent letters and fantastic combinations in words impose a useless and wholly unnecessary tax upon the memory and intellect, and they ought to be ruled out of the English language as rapidly as possible. Life is too short and time too precious to be spent in trying to master the absurdities of the spelling book, which have no excuse for existence.[122]

Beyond the misspelling of Puerto Rico's name, the Senate made a more significant change: it removed from the draft of the Bill any reference to extending the United States Constitution to the territory of Puerto Rico.[123] This sets up the legal question that would be resolved in *Downes*: does the Constitution *automatically* apply in a U.S. territory. The Senators' decision was explained thusly:

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[121] *Government of Puerto Rico*, N.Y. TIMES, Jan. 28, 1900, at 4. *See* Act of 1932, ch. 190, 47 Stat. 158:

> That from and after the passage of this resolution the island designated "Porto Rico" in the Act entitled "An Act to provide a civil government for Porto Rico, and for other purposes," approved March 2, 1917, as amended, shall be known and designated as "Puerto Rico." All laws, regulations, and public documents and records of the United States in which such island is designated or referred to under the name of "Porto Rico" shall be held to refer to such island under and by the name of "Puerto Rico."

See 48 U.S.C. § 731a (2006).

[122] Leslie's Weekly, *Common Sense in Spelling*, N.Y. TIMES, Mar. 18, 1900, at 29.

[123] The removed provision appears to mirror already-existing statutory language that extended the application of the Constitution to "organized" territories. *See* ch. 1, 18 Stat. 334 (1874) ("The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.").

> The change was made because of the opinion generally expressed by the members of the committee that our Constitution is not suited to the Puerto Rican people. The opinion was also quite general that the extension of the Constitution was not necessary. Some of the Senators expressed the opinion that the natives of the island were not yet prepared for jury trials.[124]

What started out as a bill to extend civil rights and government to Puerto Rico, and to include the island in the free-trade internal to the United States, became a much-simpler organic act to enable civilian government for the island. Republican protectionists scuttled the free trade provisions and substituted a tax.[125] Therefore, the Foraker Act also imposed a tax of "fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries" on Puerto Rican imports into the United States.[126]

While the Republicans failed to include proposed language praising the law in their platform,[127] the Democrats turned the Act into a major campaign issue in the election of 1900. The Democratic platform—after declaring their view "that the Constitution follows the flag"—attacked the Foraker Act:

> [W]e denounce the Porto Rican law, enacted by a Republican Congress against the protest and opposition of the Democratic minority, as a bold and open violation of the nation's organic law and a flagrant breach of the national good faith. It imposes upon the people of Porto Rico a government without their consent and taxation without representation. It dishonors the American people by repudiating a solemn pledge made in

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[124] *Government of Puerto Rico*, *supra* note 121, at 4.

[125] LEECH, *supra* note 40, at 487-89 (detailing the development of the Bill in Congress).

[126] *See* Foraker Act, ch. 191, 31 Stat. 77 (1900). This was a change from the originally proposed Bill, reportedly as a result of protests from and lobbying by sugar producers and citrus farmers. *See* LEECH, *supra* note 40, at 488.

[127] *See supra* note 87.

> their behalf by the Commanding General of our Army, which the Porto Ricans welcomed to a peaceful and unresisted occupation of their land. It dooms to poverty and distress a people whose helplessness appeals with peculiar force to our justice and magnanimity. In this, the first act of its imperialistic programme, the Republican party seeks to commit the United States to a colonial policy, inconsistent with republican institutions and condemned by the Supreme Court in numerous decisions.[128]

President and presidential candidate McKinley explained the Republican position on constitutional authority over the territories as follows:

> We reassert the early principle of the Republican Party, sustained by unbroken judicial precedents, that the Representatives of the people in Congress assembled have full legislative power over territory belonging to the United States, subject to the fundamental safeguards of liberty, justice, and personal rights, and are vested with ample authority to act "for the highest interests of our Nation and the people intrusted to its care." This doctrine, first proclaimed in the cause of freedom, will never be used as a weapon for oppression.[129]

With the respective arguments already articulated by the opposing sides in the political branches of government, a judicial decision would have to settle the matter. On November 20, 1900, George R. Bidwell, the same collector of customs at the port of New York involved in *De Lima*, demanded $659.35 in taxes:

> [U]pon thirty-three (33) boxes of oranges . . . from the port of San Juan . . . and . . . upon 543 boxes of oranges, [also] the product of the island of Porto Rico, consigned to these plaintiffs ["Samuel B. Downes, doing business under the firm name of S.B. Downes & Company,"] at the port of New York and brought thither from the port of Mayaguez in the said island

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[128] *Democratic Party Platform of 1900: July 4, 1900*, *supra* note 86.

[129] McKinley, *supra* note 90.

> of Porto Rico during the month of November, 1900, by the steamer Ponce . . . .[130]

The plaintiffs paid under protest, got their oranges and—represented by Coudert Brothers,[131] the New York City law firm, with offices at 71 Broadway—filed their suit that same day! The complaint, which was verified under oath by Samuel B. Downes personally, alleged a case "arising under" the Constitution, specifically:

> [T]he said oranges were not liable to duty, the same not having been imported from any foreign country within the meaning of any valid statute or executive order of the United States, but were merchandise which must, under and by virtue of the provisions of the Constitution of the United States in that regard, be admitted to free entry in any port of the United States.[132]

Procedurally, this was the period of the Evarts Act of 1891, during which the circuit courts lost their appellate jurisdiction to the newly-created courts of appeals, but retained their original trial jurisdiction.[133] Additionally, this was not that long after the lower federal courts were first granted original jurisdiction over federal question complaints in the Judiciary Act of 1875,[134] and it predated the enactment of the Federal Rules of Civil Procedure in 1938. Therefore, rather than filing a Motion to Dismiss under Rule 12 of the current Federal Rules of Civil Procedure, United States Attorney for the Southern District of

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[130] *See* THE INSULAR CASES, *supra* note 102, at 723-24.

[131] Paul Fuller was a partner at Coudert Brothers, which represented the private litigants in the most important Insular Cases, along with Frederic R. Coudert, Jr. He was born in 1856, orphaned of mother and abandoned by his father. He was raised by Charles Coudert and became a prominent attorney in the New York Bar. He helped to found Fordham Law School and was its dean. *The Paul Fuller Memorial Children's Service Program: Coudert Brothers LLP Globalizes Pro Bono*, THE METRO. CORP. COUNSEL, Aug. 1, 2004, http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=August&artYear=2004&EntryNo=1474 (last visited Mar. 15, 2010).

[132] *See* THE INSULAR CASES, *supra* note 102, at 724.

[133] ERWIN CHEMERINSKY, FEDERAL JURISDICTION 22-23 (2d ed. 1994) (citing Evarts Act of 1891, ch. 517, 26 Stat. 826). "In 1911, the circuit courts were eliminated and their original trial jurisdiction transferred to the district courts." CHEMERINSKY, *supra* at 24 (citing Act of 1911, ch. 1, 36 Stat. 1087).

[134] Ch. 137, 18 Stat. 470 (1875). *See also* CHEMERINSKY, *supra* note 133, at 222.

New York Henry L. Burnett filed a demurrer arguing "[t]hat the complaint does not state facts sufficient to constitute a cause of action."[135] On November 30, 1900, Circuit Judge Henry Lacombe heard oral argument "at the post-office building, in the borough of Manhattan, in the city of New York" and ruled in favor of the defendant, ordering the complaint dismissed and awarding costs to the defendant.[136] Judgment was entered dismissing the action and taxing costs in the amount of $16.30 at 12:30 p.m. on December 1, 1900.[137] Downes filed a writ of error—giving notice of the appeal—with the circuit court on December 5, 1900. Judge Lacombe officially allowed the matter to proceed, and clerk of the court John A. Shields certified a nineteen-page record for appeal on December 7, 1900, canceling a "ten-cent U.S. internal-revenue stamp."[138] The case was filed with the Supreme Court on December 11, 1900 and assigned case number 507.[139]

Though the plaintiffs were clearly interested in the constitutional principle, the monetary amounts involved were not insubstantial. The Foraker Act had provided a salary of $8,000 dollars a year for Puerto Rico's governor, and salaries between $3,000 and $5,000 for high officials including the justices of the Supreme Court.[140] The justices of the United States Supreme Court earned $10,000 a year in 1901, and that salary had just been increased in 1900 after remaining at $6,000 for forty years.[141] Moreover, the salaries of the high officials were immense sums in the context of Puerto Rico. Just before the American invasion, a Puerto Rican teacher earned 180 *pesos*—the Spanish monetary unit—a year, and peasants earned four-eights to seven-eights *peso* per day.[142] Section 11 of the Foraker

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[135] THE INSULAR CASES, *supra* note 102, at 725.

[136] *Id.* at 725-26.

[137] *Id.* at 726.

[138] *Id.* at 721-22. The system of canceling stamps to pay court filing fees is still used in the local courts in Puerto Rico, where I am admitted to practice.

[139] *Id.* at 729.

[140] *See* Foraker Act, ch. 191, 31 Stat. 77, 85 (1900).

[141] RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 22 (1996) (citations omitted).

[142] MALAVET VEGA, *supra* note 56, at 293, 351, 448–49, 505–8. On the monetary units in Spanish times, see PICÓ, *supra* note 56, at 9.

Act provided for an exchange rate of sixty cents for every *peso*,[143] and the first legislative assembly elected under the auspices of the Foraker Act provided minimum salaries of between thirty and fourty "dollars per school month, for each month of actual service" for teachers in Puerto Rico.[144] Therefore, while we might today resent a constitutional doctrine that relegates Puerto Ricans and other territorial peoples of the United States to second-class citizenship for a few hundred dollars and 576 boxes of oranges, in 1900, $659.35 was a lot of money.

Justice Brown announced the result of the case, but the four concurring justices joined or issued separate opinions; therefore, in articulating his reasoning he wrote only for himself.[145] The Court ruled:

> that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes [discriminatory] duties upon imports from such island [to the United States].[146]

Despite its division, the majority rejected the argument that in matters of taxation, Congress could not treat the U.S. territory of Puerto Rico differently than a U.S. state; thus, Puerto Rican exports to the U.S. mainland were subject to duties not imposed on the products of the states. Therefore, import tariffs on oranges, sugar, or any other Puerto Rican product, were legitimately imposed by the U.S. Congress.[147] Justice White's concurring opinion had the most votes, since it was joined by Justices Shiras and McKenna, the same three who had subscribed McKenna's dissent in *De Lima*. Articulating what will eventually become the accepted doctrine, White found that Puerto Rico (and by analogy Guam and the Philippines) was an organized but *unincorporated* territory of the United States, that is, part of the United States under the "Territorial Clause"[148] but subject to absolute congressional legislative authority under that provision and the "Necessary and Proper Clause" of the U.S. Constitution.[149] Justice Gray, the final vote for the bare majority, issued a separate concurrence, like Brown speaking only for himself.[150] The four dissenting justices—Chief Justice Fuller, Justices Harlan, Brewer and Peckham—joined a single dissenting opinion authored by Fuller,[151] but Justice Harlan also issued a separate dissent.[152] Justice Harlan's dissent has become better known and regarded over the years, just as Justice White's concurrence became the accepted constitutional doctrine.

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[143] *See* Foraker Act, ch. 191, 31 Stat. 77, 80 (1900).

[144] *Id.* at § 16-18. *See also* WILLIAM H. HUNT, ACTS AND RESOLVES OF THE FIRST LEGISLATIVE ASSEMBLY OF PORTO RICO 34 (1901).

[145] Downes v. Bidwell, 182 U.S. 244, 247 (1901). The opinion states that "Mr. Justice Brown announced the conclusion and judgment of the court." *Id.*

[146] *Id.* at 287. The Foraker Act required "the payment of '15 per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries'" *Id.* at 248.

[147] In other words, the equal taxation provision of the Constitution did not benefit Puerto Rico. *Cf.* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States").

For those who believed that territorial expansion along an imperialist/colonial model was a sound national policy, Justice Brown's obvious contradictions between his position in *De Lima* and *Downes* were intellectually indefensible. Regardless of Brown's consistency issues, this seems rather unfair to the four other members of the *De Lima* majority—Chief Justice Fuller, Justices Harlan, Brewer and Peckham, the dissenters in *Downes*—and to the opinion they joined. The four dissenters in *Downes* express views that are perfectly consistent with their majority opinion in *De Lima. De Lima,* however*,* was limited to its facts, because the then existing state of the law was superseded by the Foraker Act and by *Downes*, making the latter the dominant decision. Unfortunately for the dissenters, when judging *Downes*, Justice White's plurality became the favorite because it articulates the pro-empire view in an intellectually-defensible manner. For example, the New York Times editorialized soon after the cases:

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[148] *See* U.S. CONST. art. IV, § 3, cl. 2.

[149] U.S. CONST. art. I, § 8, cl. 18.

[150] Downes v. Bidwell, 182 U.S. 244, 345 (1901) (Gray, J., concurring).

[151] *Id.* at 347 (Fuller, J., dissenting).

[152] *Id.* at 375 (Harlan, J., dissenting).

> The *De Lima* case was a stumbling block for Justice Brown. By asserting in that case the principle that cession and possession made Porto Rico a part of the territory of the United States he invalidated much of the reasoning by which he reached, in the Downes case, the conclusion that for purposes of tariff legislation the island is not territory of the United States within the prohibition which the Constitution lays upon Congress respecting uniform taxes. In making this assertion we are supported by the high authority of Horace Gray and by the clearly reasoned opinion of Justice White, speaking for himself and Justices Shiras and McKenna, concurring in the view that the Porto Rican tariff is not repugnant to the Constitution, but reaching that conclusion by a process of reasoning and interpretation solidly based upon the historical practice and judicial sanctions of a century of territorial increase. It would have been better for the reputation of the Supreme Court had the task of writing its opinion in the controlling case of Downes been committed to Justice White.[153]

The New York Times editorial also noted another strength in Justice White's opinion: it overruled *Scott v. Sanford*, which the newspaper celebrated with the following editorial comment: "The *ex proprio vigore* doctrine of constitutional application as expounded by Calhoun in the interest of the slave power is destroyed forever."[154]

Some of the most prominent legal thinkers of the time took positions on the matters at issue in the Insular Cases, most notably in early issues of the Harvard Law Review and the Yale Law Journal. Indeed, the early volumes of those two journals are full of articles debating the legal status of the new island territories—four articles in volume twelve and three in volume thirteen of the Harvard journal, and four in volume eight of the Yale journal—for the years 1898-1899. For example, Harvard Law School Dean Langdell supported unfettered congressional authority,[155] as did Simeon E. Baldwin.[156] Recognizing that the executive was in effective control of the conquered territories, Baldwin addressed executive powers, and, referring specifically to the power of the presidency, he wrote: "[A]ll honest men, not blinded by party passion, felt that the President held great constitutional functions, which made him, in his sphere, little short of the dictator of the Republic."[157] More generally, this legal scholarship interpreted the Territorial Clause along three lines: (1) absolute congressional power totally unfettered by other constitutional constraints; (2) almost completely unfettered congressional authority but limited by fundamental constitutional guarantees; and (3) the "Constitution Follows the Flag," meaning that all constitutional guarantees and constraints on congressional power apply in the territories.[158]

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[153] Editorial, *The Court and the Opinions*, N.Y. TIMES, May 29, 1901, at 8.

[154] *Id. See* discussion *infra* note 177 and accompanying text. The "Calhoun" named in the editorial is John Calmore Calhoun, most famous as the staunchly racist, proslavery Senator from South Carolina from 1832 until his death in 1850 (although he left the Senate to serve as Secretary of State in 1845). Calhoun had served in the House of Representatives, as Secretary of War and as Vice-President of the United States under Presidents John Quincy Adams and Andrew Jackson. He was the first person to resign the vice-presidency, which he did in order to run for the Senate in 1832.

Downes effectively established the distinction between different types of "domestic territories," but now in concurrence rather than in dissent, with White labeling them incorporated and unincorporated territories. This was important because at the time the United States already had other territories, most of which were then believed to be on their way to statehood.

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[155] *See* C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 379-92 (1899) (detailing how, in the author's view, most provisions limiting congressional authority to legislate did not apply to the new territories).

[156] *See* Simeon E. Baldwin, *The People of the United States*, 8 YALE L.J. 159, 159, 167 (1899) (arguing that the phrase "the People of the United States" in the preamble of the Constitution limited the applicability of the Constitution to citizens of the states); *see also* Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899) (upon approval of the Treaty of Paris by the U.S. Senate, authority to govern the territories would be transferred from the executive to the legislative branch).

[157] Simeon E. Baldwin, *Absolute Power, An American Institution*, 7 YALE L.J. 1, 19 (1897).

[158] Trías Monge provides a succinct analysis of the legal literature of the time. *See* 1 HISTORIA CONSTITUCIONAL, *supra* note 54, at 238.

Indeed Arizona, New Mexico, Oklahoma, Alaska, and Hawaii would eventually become states of the union. The District of Columbia, as a special federal enclave, also fell within this discourse, but has not become a state. This made the arguments of absolute congressional authority unacceptable to scholars like Abott Lawrence Lowell.[159] Puerto Rico in his view was a "part of" the United States but had not been "incorporated" into it. This was the perfect imperial compromise. We could control land and its people by making it domestic U.S. territory relative to other countries, but we were not bound to give to the people living in those territories the same rights enjoyed in the states of the union.

In his dissenting opinion, Justice John Marshall Harlan found the distinction less than compelling:

> I am constrained to say that this idea of "incorporation" has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.
>
> In my opinion Porto Rico became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and that Congress could not thereafter impose any duty, impost, or excise with respect to that island and its inhabitants, which departed from the rule of uniformity established by the Constitution.[160]

Most important, the majority, over the vigorous dissent of the four justices, gave to the U.S. Congress almost unfettered discretion to do with Puerto Rico what it wanted. In the dissenting opinion written by Chief Justice Melville W. Fuller, joined by Justices Harlan, David J. Brewer, and Rufus W. Peckham, the minority called for constitutional values to prevail over the desire for empire:

> They may not, indeed, have deliberately considered a triumphal progress of the nation, as such, around the earth, but, as [Chief Justice John] Marshall wrote: "It is not enough to

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[159] *See* Abott Lawrence Lowell, *The Status of our New Possessions*, 13 HARV. L. REV. 155 (1899).

[160] Downes v. Bidwell, 182 U.S. 244, 391 (1901) (Harlan, J. dissenting).

> say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception."
>
> This cannot be said, and, on the contrary, in order to the successful extension of our institutions, the reasonable presumption is that the limitations on the exertion of arbitrary power would have been made more rigorous.[161]

Justice Horace Gray's brief concurring opinion proved to be prophetic: "If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution."[162] Justice White's opinion, however, includes an important caveat suggesting that territorial status could not last forever:

> Conceding, then, for the purpose of the argument, it to be true that it would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not intended to be incorporated, *the presumption necessarily must be* that that department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to *its duty under the Constitution, and, therefore, when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate.* I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.[163]

As discussed earlier, the *Boumediene* majority also classified the "situational" standard as producing rules of temporary duration. Nevertheless, to this day Puerto Rico continues to be an unincorporated territory of the United States, albeit with an increasingly powerful locally elected government.

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[161] *Id.* at 374–75 (Fuller, C.J., dissenting).

[162] *Id.* at 346 (Gray, J., concurring). This position was eventually adopted by a majority of the Court in *Balzac.*

[163] *Id.* at 343–44 (White, J. concurring) (emphasis added).

Politically, the majority in *Downes* followed the Republican policy of empire building: territorial expansion unburdened by the concept of having the Constitution follow the flag. In fact, the Court majority was principally composed of republican appointees and the dissents were filed principally by democrat-appointed justices. The two exceptions in fact prove the policy rule. Former Louisiana Democratic Senator White voted with the Republican majority. His fellow southerner, but Republican appointee, Harlan made a clean break with anti-black racism in his dissent in *Plessy v. Ferguson*,[164] and had made his policy choice when he joined the Union Army during the Civil War (White fought for the Confederacy).[165] So, to the extent that they followed the Republican policies of anti-insular-peoples' nativism and territorial expansion, the alignment of justices was fairly understandable. What is more interesting is how the pro-empire position of a three-justice plurality in a deeply divided Court went on to become the shared constitutional vision that is now unanimous among the justices, no matter their political stripes.

VI. THE *DOWNES* SUPREMACY: FROM IMPERIAL VACILLATION TO UNANIMOUS PLENARY POWER

The common phrase "Insular Cases" was immediately used in the media to describe the nine cases of the term of October 1900 when they were filed. The legal literature quickly picked up on this usage as well.[166] The Supreme Court itself designated them as the "Insular Tariff Cases" as indicated in its Statement of the Case in *De Lima v. Bidwell.*[167] The use of the word insular rather than territory would distinguish the new possessions from the territories existing prior to the Spanish-American War, which were eventually destined for statehood. Accordingly, the United States Supreme Court in *Hawaii v. Mankichi* uses "Insular Cases" as a reference to the cases resolved in 1901 involving the territorial possessions acquired after the Spanish-American War.[168] As used in this context, "insular" simply means "relating to, or being an island."[169] But another meaning of the term insular might better describe the attitudes: "physically or emotionally removed from others."[170]

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[164] Plessy v. Ferguson, 163 U.S. 537 (1896). The Court's alignment in the Plessy case is discussed *infra* notes 243-45 and accompanying text.

[165] *See generally* JAMES W. ELY, JR., THE FULLER COURT: JUSTICES, RULINGS, AND LEGACY (2003); REBECCA S. SHOEMAKER, THE WHITE COURT: JUSTICES, RULINGS, AND LEGACY (2004); WALTER F. PRATT, JR., THE SUPREME COURT UNDER CHIEF JUSTICE EDWARD DOUGLASS WHITE, 1910-1921 (1999).

[166] *See, e.g.*, Charles E. Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169 (1901).

Some authors take a broad view, identifying the Insular Cases as a complex series of decisions that helped create the "American empire." Guadalupe T. Luna, for example, noted that the *Scott v. Sanford* decision is arguably the first of the Insular Cases because it created the imperial United States with its inherent constructs of citizens and noncitizens within U.S. territorial control; *Balzac v. Porto Rico* then established the categories of citizenship based on larger or lesser entitlements to constitutional rights.[171] One might also see them even more generally within the law of conquest or the "right of discovery." In *Johnson v. M'Intosh,*[172] the Supreme Court ruled that the "right of discovery" and the "right of conquest" gave Europeans legal title over the American continents. It stated as well that Native Americans could not be *assimilated*, i.e., they could not be "incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected."[173] Incorporation was not "practicable," thus requiring the Europeans to choose between "abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword."[174]

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[167] De Lima v. Bidwell, 182 U.S. 1, 2 (1901).

[168] Hawaii v. Mankichi, 190 U.S. 197 (1903). As of 2006, the Supreme Court had used the phrase "Insular Cases" in twenty-three of its published opinions, starting with *Mankichi*, and twenty-eight times has it referred more generally to the cases or to the possessions. (Lexis Search conducted June 26, 2006.) The latest back then was United States v. Lara, 541 U.S. 193 (2004) (regarding tribal authority to prosecute crimes). *Rasul v. Bush* makes passing reference to "insular possessions" in regards to the habeas corpus statute. Rasul v. Bush, 542 U.S. 466, 475 (2004) (case arising out of detentions in Guantánamo). But *Boumediene* is the most recent decision that follows the rule of the Insular Cases.

[169] WEBSTER'S II NEW COLLEGE DICTIONARY 575 (1999).

[170] ENCARTA WORLD ENGLISH DICTIONARY 931 (1999).

[171] Guadalupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and* Dred Scott v. Sanford, 53 U. MIAMI L. REV. 691, 708-09 (1999) (noting that *Scott v. Sanford* gave constitutional authority to constructs of citizens and noncitizens within U.S. territorial control). *See also* Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the* Dred Scott *Case*, 82 CHI.-KENT. L. REV. 393 (2007) (a thorough and updated study of the historical context and constitutional bases for the decision).

[172] Johnson v. M'Intosh, 21 U.S. 543 (1823).

Like American Indians, African slaves were also not allowed to assimilate into American citizenship. Most students of American law know *Scott v. Sanford* for its shameful definition of African slaves as non-citizens and chattel property rather than as persons entitled to constitutional rights.[175] But, as President McKinley repeatedly alluded to during the 1900 presidential election campaign, *Scott v. Sanford* was also a Territorial Clause case in which the majority stated:

> The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government,

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[173] *Id.* at 589.

[174] *Id.* at 590. The Supreme Court justified genocide as follows:

> When the conquest is complete . . . the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people. . . .
>
> But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

Id. at 589-90.

[175] Scott v. Sanford, 60 U.S. 393, 404-05 (1856) (African slaves imported into the United States and their descendants, free or otherwise, "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.")

> it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. *It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority* . . . .[176]

Scott v. Sanford ruled that Congress could not ignore the three constitutional provisions that protected slavery when legislating for new territories.[177] Paradoxically, while the Civil War and the Thirteenth and Fourteenth Amendments reversed the de jure exclusion of African slaves from citizenship, the *Downes* decision creates a new kind of lesser citizenship: it reversed *Scott v. Sanford*'s interpretation of the Territorial Clause, allowing Congress to ignore constitutional provisions prohibiting discriminatory taxation and requiring trial by jury.

Clearly *Downes* and its companion cases fit well in the larger context of the jurisprudence of American expansionism. *Johnson v. M'Intosh* and *Scott v. Sanford* represent the first age of American territorial expansion characterized by territorial conquest from the native inhabitants, followed by colonization by the growing U.S. immigrant population. The second age of expansion did not involve this territorial incorporation into the nation or the re-population of the territory by "American" "pilgrims" rather than by the unassimilable Latinas/os.[178] This article is concerned with this second age of expansionism that started with the Spanish-American War and was legally defined by the Insular Cases that followed it.

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[176] *Id.* at 447 (emphasis added).

[177] U.S. CONST. art. I, § 2, cl. 3 (slaves contribute 3/5 to their masters' entitlement to congressional representation); U.S. CONST. art. I, § 9, cl. 1 (limiting the power of Congress to restrict the slave trade), U.S. CONST. art. IV, § 2, cl. 3 (runaway slaves had to be returned to slave states). *See generally* RACE AND RACES, *supra* note 5, at 103-04 (explaining that "[d]espite the protections of slavery in the Constitution, its drafters were careful not to use the word 'slave' at all, despite language that was understood by all to refer to slaves.").

[178] On Latina/o assimilation generally, see Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997) (a poignant discussion of growing up Latina/o in California). *See also* George A. Martínez, *Latinos, Assimilation and the Law: A Philosophical Perspective,* 20 CHICANO-LATINO L. REV. 1 (1999) (drawing analogies between American demands of assimilation and insect biology and *Star Trek's* Borg characters).

The first reported case in which the facts occurred in or around Puerto Rico after the start of the Spanish-American War is *The Olinde Rodrigues*, which involved the seizure of a vessel by the United States Navy during its blockade of San Juan harbor in July of 1898. The matter was decided on May 15, 1899.[179] But the constitutional law of the second age of expansion starts with the nine Insular Cases resolved in 1901. While no knowledgeable person would challenge *Downes's* labeling as one of the Insular Cases, no definitive listing of those decisions is agreed upon.[180] This article divides them into three categories:

First, the nine cases of the October Term of 1900, with seven opinions issued on May 27, 1901, and two in December of 1901, in which a deeply divided Supreme Court, under Chief Justice Melville Weston Fuller, narrowly allowed the McKinley administration and Congress to exercise plenary powers in dealing with the territorial acquisitions resulting from the Spanish-American War.[181] Justice White's concurring opinion in *Downes* adopts the categories of incorporated and unincorporated territories as determinative of the bundle of constitutional rights and obligations that apply in the territories. Hereafter, these cases will be referred to as "*Downes* and its companion cases."

Second, the "intermediate cases" resolved between 1903 and 1922, in which the Fuller Court, on its way to becoming the White Court in 1910, and the Taft Court in 1921, tried to agree on a single constitutional doctrine in its application of the Territorial Clause of the Constitution.

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[179] The Olinde Rodrigues, 174 U.S. 510 (1899) (about ownership of vessel taken by the U.S. navy during its blockade of San Juan harbor).

[180] For a general discussion of this debate, see Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225 (1996); EFRÉN RIVERA RAMOS and THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001). *See also A Convenient Constitution*, *supra* note 5, at 975 n.4 and accompanying text. The most serious work on the Insular Cases was done by José Trías Monge, the late Chief Justice of the Puerto Rico Supreme Court, in the first volume of this five volume collection on the constitutional history of Puerto Rico. *See* 1 HISTORIA CONSTITUCIONAL, *supra* note 54.

[181] I purposely avoid stating that the Court was led by Chief Justice Fuller, as on this matter he was mostly among the dissenters or at best concurred in the judgments. *See generally* ELY, *supra* note 165.

Third, a single decision that is arguably the last of the Insular Cases: *Balzac v. Porto Rico.* A unanimous Supreme Court settled upon Justice White's plurality opinion and his incorporated/unincorporated territory dichotomy as the applicable constitutional doctrine, and this remains the rule to this day, as recognized by all nine justices in *Boumediene.* Subsequent cases have merely reinforced the continued status of *Downes* and *Balzac* as the law of the land in the application of the Territorial Clause of the Constitution of the United States.

The cases between *Downes* and *Balzac*, those in the second category of Insular Cases, start with *Hawaii v. Mankichi*, in 1903, in which the Court ruled that Hawaiian territorial law, not the Seventh Amendment, governed the defendant's right to a criminal jury trial. White and McKenna concurred, stating that congress had not expressly incorporated Hawaii, therefore full constitutional protections such as the right to jury trial did not apply in the territory.[182] The decision was significant because Justice Oliver Wendell Holmes had replaced Justice Horace Gray on the Supreme Court and Justice Shiras was replaced by Justice William Day.[183] *Mankichi* was soon followed by *González v. Williams*, a unanimous ruling subscribed by Chief Justice Fuller in favor of a Puerto Rican woman seeking entry into New York City after the Immigration Commissioner had ruled her a foreigner and excluded her from the city. The Court ruled that Puerto Ricans while not citizens of the United States are nonetheless subjects or "nationals" of this country and therefore not foreigners for purposes of the immigration laws.[184]

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[182] Hawaii v. Mankichi, 190 U.S. 197, 218-19 (1903).

[183] *Id.* Fuller, Harlan, Brewer, and Peckham dissented. *Id.* at 221-26. Harlan filed a separate dissent. *Id.* at 226-49.

[184] Gonzales v. Williams, 192 U.S. 1 (1904). Citing *Elk v. Wilkins*, 112 U.S. 94 (1884), the *Gonzales* Court ruled that Puerto Ricans were "Nationals" of the United States, and were neither citizens, for purposes of constitutional guarantees, nor foreigners, for purposes of the immigration laws.

In 1904, the Court issued *Kepner v. United States*,[185] *Binns v. United States*,[186] and, more importantly, *Dorr v. United States*.[187] In *Dorr*, a case originating in the Philippines, White, now joined by a majority of the Court, reaffirmed the incorporation doctrine that he first articulated in *Downes* and found that the Philippines were an unincorporated territory.[188]

In 1906, a case involving territorial Alaska, *Rassmussen v. United States*, reiterated the result of the 1901 decisions and continued to solidify a prevailing view from among the many articulated by the justices in the prior opinions. Writing for the majority, Justice White ruled that Alaska, unlike Puerto Rico, was an incorporated territory of the United States, with full constitutional protections for its residents. Harlan concurred in the result, continuing to reject the incorporated/unincorporated distinction and stating that constitutional guarantees apply fully in all territories. Brown also concurred, expressing his view that congress has exercised plenary powers in granting such rights to Alaskans.[189] Other cases continuing to apply White's incorporation doctrine in this period were *Dowdell v. United States* in 1911[190] and *Porto Rico v. Rosaly* in 1913, in which then Chief Justice White wrote for a unanimous Court that Puerto Rico was "a completely organized Territory, although not a territory incorporated into the United States."[191]

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[185] Kepner v. United States, 195 U.S. 100 (1904).

[186] Binns v. United States, 194 U.S. 486 (1904) (involving taxation in Alaska; opinion by Brewer, with indication that Harlan took no part in the case, but no mention of the other justices either joining or dissenting, though Brewer speaks for the Court).

[187] Dorr v. United States, 195 U.S. 138 (1904).

[188] *Id.* at 142-43 (only Harlan remained firm in opposing the imperial constitution; Fuller and other former dissenters concurred in the result, though they still noted their rejection of the incorporation notion).

[189] Rassmussen v. United States, 197 U.S. 516 (1905). Justice Moody had replaced Justice Henry Billings Brown on the Court by then.

[190] Dowdell v. United States, 221 U.S. 325, (1911) (dissent by Harlan, without opinion; Day writes for all others that *Dorr* disposes of the matter and that Philippine Supreme Court properly affirmed defendants' convictions after requiring trial court to supplement record on appeal.)

[191] Porto Rico v. Rosaly, 227 U.S. 270, 274 (1913) (quoting Kopel v. Bingham, 211 U.S. 468, 476 (1909) (ruling that Puerto Rico's government enjoyed sovereign immunity). White became Chief Justice by appointment of President William Howard Taft, in 1910. *See* SHOEMAKER, *supra* note 165; PRATT, *supra* note 165.

The Foraker Act—the organic act for Puerto Rico interpreted in *Downes*—was replaced by the Jones Act of 1917, making changes to the local government and, most significantly, giving Puerto Ricans U.S. citizenship.[192] In 1922, *Balzac v. Porto Rico* applied the Jones Act and in the process turned Justice White's concurrence in *Downes v. Bidwell* into normative constitutional doctrine, and still quite applicable precedent, as noted in *Boumediene*. The Court unanimously affirmed *Downes*, and cited Justice White's opinion and the incorporation doctrine as controlling.[193] *Balzac v. Porto Rico* was resolved by the U.S. Supreme Court after passage of the Jones Act. By adopting one of the many views articulated in the earlier Insular Cases, this case helped clarify the constitutional relationship between Puerto Rico and the United States. It stated that "the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the Court."[194] On the specific facts of the case, *Balzac* ruled that even after the grant of U.S. citizenship to the residents of Puerto Rico, not all U.S. constitutional protections applied to the territory.[195] Fundamental rights, generally those guaranteed by the Due Process Clause, would automatically apply to U.S. citizens living in the unincorporated territories, but personal freedoms would not. Among the latter are the right to a trial by jury and the right to uniform taxation.[196]

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[192] *See Jones Act of 1917*, *in* 1 P.R. LAWS ANN., at 72–73 (2008) (conferring U.S. citizenship on all "citizens of Puerto Rico;" it adopted the definition of Puerto Rican citizenship included in section 7 of the Foraker Act). This new law, however, left some confusion about Puerto Rican citizenship that required judicial resolution. *See* 1 P.R. LAWS ANN., at 83, 120. For an interesting discussion of some of the perils of "statutory citizenship" for those born in U.S. territories, see Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months And a Hundred Yards Short Of Citizenship*, 107 MICH. L. REV. 1, 1-2 (2008) (arguing that the then Presidential Candidate was not a "natural born" citizen under Art. II § 1 of the Constitution due to an exclusion in the statute applicable in the Panama Canal Zone at the time of his birth). *See also* ROMÁN, *supra* note 5; Jimenez v. Glover, 255 F.2d 54 (1st Cir. 1958).

[193] Balzac v. Porto Rico, 258 U.S. 298 (1922).

[194] *Id.* at 305.

[195] The Court cites with approval Justice White's position. *Id.* (quoting Dorr v. United States, 195 U.S. 138, 149 (1904)).

[196] The Court explained the applicability of fundamental rights to the unincorporated territories. *Balzac*, 258 U.S. at 312–13. *Balzac* itself rules that trial by jury was

In *Reid v. Covert*, in 1957, the Supreme Court came close to overruling *Downes* and *Balzac*, but could muster only a plurality. The case involved two civilian wives—both U.S. citizens—who killed their husbands who were members of the U.S. armed forces, on U.S. military bases in England and Japan, respectively, and were tried by military tribunals. The Supreme Court held that depriving the women of a right to a jury trial in a civilian court violated their constitutional rights. The Court ruled that the Constitution protects U.S. citizens even outside U.S. territory.[197] Specifically criticizing *Balzac* and *Downes*, Justice Hugo Black, joined by Chief Justice Earl Warren and Associate Justices William Douglas and William Brennan, wrote:

> This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments. Moreover, in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.[198]

But concurring in the result only, Justices Felix Frankfurter and John Marshall Harlan II (the grandson of the John Marshall Harlan involved in *Downes*)[199] distinguished the Insular Cases and believed them to be good law.[200] In his opinion Frankfurter put it this way:

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one such right. *See also* De Lima v. Bidwell, 182 U.S. 1 (1901); Downes v. Bidwell, 182 U.S. 244 (1901) (both cases concerning taxation).

[197] Reid v. Covert, 354 U.S. 1, 8 (1957).

[198] *Id.* at 8-9 (footnotes omitted).

[199] DAVID SCHULTZ, ENCYCLOPEDIA OF THE SUPREME COURT, 196-97 (2005).

[200] *Reid*, 354 U.S. at 41 (Frankfurter, J., concurring); *Id.* at 65 (Harlan, J., concurring).

> The results in the cases that arose by reason of the acquisition of exotic "Territory" do not control the present cases, for the territorial cases rest specifically on Art. IV, § 3, which is a grant of power to Congress to deal with "Territory" and other Government property. Of course the power sought to be exercised in Great Britain and Japan does not relate to "Territory."[201]

That Puerto Rico is still one of the "exotic territories" was directly confirmed in *Califano v. Torres*,[202] where the Supreme Court reiterated what it had said in the Insular Cases, that Puerto Rico was an unincorporated territory of the United States. The three appellees in this case had moved from Massachusetts, Connecticut, and New Jersey to Puerto Rico. While living in the states, they had received Supplemental Security Income through a federal Social Security Administration program for "qualified aged, blind, and disabled persons." When they arrived in Puerto Rico, however, their benefits were canceled. The Supreme Court, in a *per curiam* opinion, let this discrimination stand, explaining that:

> The exclusion of Puerto Rico in the amended program is apparent in the definitional section. . . . [T]he Act . . . states that no individual is eligible for benefits during any month in which he or she is outside the United States. The Act defines "the United States" as "the 50 States and the District of Columbia."[203]

The justices then concluded that:

> [W]e deal here with a constitutional attack upon a law providing for governmental payments of monetary benefits. Such a statute "is entitled to a strong presumption of constitutionality." "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket."[204]

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[201] *Id.* at 53 (Frankfurter, J. concurring).

[202] Califano v. Torres, 435 U.S. 1, 1-3 (1978).

[203] *Id.* at 2–3 (citations omitted).

[204] *Id.* at 5 (citations omitted). How curious that the Court uses the language of the war on poverty to justify the denial of funds to the poorest American citizens. *See* AMERICA'S COLONY, *supra* note 1, at 155-58.

The "rational basis" for Congress's action in this case was described by the Court in *Harris v. Rosario*: "In [*Califano*], we concluded that a similar statutory classification was rationally grounded on three factors: Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy."[205] In *Torres v. Puerto Rico*, the U.S. Supreme Court ruled that Congress had the power to grant, and conversely to withhold, constitutional guarantees from the U.S. citizens who may be found in Puerto Rico.[206]

Harris v. Rosario[207] exposes Puerto Rico's continued territorial status. In this case the U.S. Supreme Court, summarily, but with a written opinion, ruled that the lower level of reimbursement provided to Puerto Rico under the Aid to Families with Dependent Children program did not violate the Fifth Amendment's Equal Protection Clause. In accordance with its authority under the Territorial Clause of the U.S. Constitution, Congress can make any necessary rules that affect the territories, and it may treat Puerto Rico differently from states if it has a rational basis for its actions. Justice Thurgood Marshall noted in his lonely dissent that he and three of his contemporaries on the Court had expressed opposition to *Downes* and its denial of constitutional protections to U.S. citizens, but they did not join him here, and *Harris* ultimately really illustrates how the Insular Cases have become entrenched constitutional doctrine.[208]

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[205] *See* Harris v. Rosario, 446 U.S. 651, 652 (1980). First, while Puerto Ricans do not pay federal income taxes, they do pay Social Security and other federal taxes, and second, it is difficult to conceive how $300 million for children's welfare would negatively disrupt the Puerto Rican economy. *See also* AMERICA'S COLONY, *supra* note 1, at 155-58 (discussing Puerto Rico's economy).

[206] *See* Torres v. Puerto Rico, 442 U.S. 465 (1979). But at least four Justices expressed the view that more constitutional guarantees ought to apply. *Id.* at 475-76 (Brennan, J., concurring in the judgment with Stewart, Marshall, and Blackmun). *Boumediene* refers to *Torres* expressly as discussed *supra* in Part I.

[207] *Harris*, 446 U.S. at 651.

[208] *Id.* at 653-54. (Marshall, J., dissenting). Marshall wrote:

> It is important to remember at the outset that Puerto Ricans are United States citizens and that different treatment to Puerto Rico under AFDC may

Prior to *Boumediene,* the most recent reference to the Insular Cases could be found in Justice Thomas's opinion concurring in the judgment in *United States v. Lara*, in which, citing *Reid v. Covert*, he writes: "The 'Insular Cases,' which include the Hawaii and Puerto Rico examples . . . involved Territories of the United States, over which Congress has plenary power to govern and regulate."[209]

As long as the Insular Cases remain good law—and *Boumediene* clearly rules that they do—Congress, in the exercise of its authority under the Territorial Clause, may unilaterally change the statutory relationship between the territories and the United States, as it deems appropriate. Moreover, one Congress cannot bind another; therefore, statutory language purporting to limit future legislative enactments is unconstitutional.[210] Nevertheless, to this day, the Puerto Ricans continue to travel with a U.S. passport but without the legal right to a separate Puerto Rican citizenship.

Attempts to create a legal Puerto Rican citizenship have been legally and politically rebuffed. For example, in an interesting but *sui generis* case, the Supreme Court of Puerto Rico held that Puerto Rican citizenship was independent of U.S. citizenship because of certain provisions of Puerto Rican law. The opinion in *Ramírez de Ferrer v. Mari Brás*, was issued on

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> well affect the benefits paid to these citizens. While some early opinions of this Court suggested that various protections of the Constitution do not apply to Puerto Rico, the present validity of those decisions is questionable. We have already held that Puerto Rico is subject to the Due Process Clause of either the Fifth or Fourteenth Amendment and the equal protection guarantee of either the Fifth or the Fourteenth Amendment. The Fourth Amendment is also fully applicable to Puerto Rico, either directly or by operation of the Fourteenth Amendment. At least four Members of this Court are of the view that all provisions of the Bill of Rights apply to Puerto Rico.

Id. (internal citations and footnote omitted).

[209] United States v. Lara, 541 U.S. 193, 225 (2004) (citing U.S. CONST. art. IV, § 3, cl. 2; Reid v. Covert, 354 U.S. 1, 13, (1957)).

[210] *See* I.N.S. v. Chadha, 462 U.S. 919 (1983) ("legislative veto," the reservation of authority by the Congress to invalidate executive action taken pursuant to passed statute unconstitutional); *see also* Bowsher v. Synar, 478 U.S. 714, 733-34 (1986) (Gramm-Rudman Balanced Budget Act provisions requiring specific executive action to reduce deficit violated constitutional separation of powers).

November 18, 1997, according to the published text.[211] On the day *before* the opinion was issued, the Puerto Rican law alluded to in the opinion was amended to require both U.S. citizenship and Puerto Rico residency in order to become a citizen of the island.[212] This made the matter of law addressed in the opinion moot. The U.S. Department of State later rescinded Juan Mari-Brás's renunciation of his U.S. citizenship, returning him to his legal status before the case was resolved. Therefore, Puerto Ricans are limited to the legal citizenship of the United States, but they are not entitled to the full enjoyment of the rights usually associated with that citizenship.

VII. *DOWNES'S* LEGACY: CITIZENSHIP OF A SECOND-CLASS

The most enduring effect of *Downes v. Bidwell* and the Insular Cases is the effective definition of a lesser level of citizenship for territorial subjects of the United States.[213] Section 1 of the Fourteenth Amendment reads, in part: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[214] To the extent that this provision creates formal universal U.S. citizenship, it is belied by the reality of that citizenship, which is often constructed on the basis of faultlines defined by essentialized notions of race. The territorial peoples are just one example of this. One can easily include American Indians, African Americans,[215] Asian Americans,[216] and Mexican Americans among the victims of these citizenship constructs.[217]

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[211] Ramírez de Ferrer v. Mari Brás, 144 P.R. Dec. 141 (1997). Plaintiff Miriam Ramírez de Ferrer is a pro-statehood activist who later serves as a Puerto Rican senator. Juan Mari Brás is the founder of the MPI and the Socialist Party of Puerto Rico.

[212] P.R. LAWS. ANN. tit. 1, § 7 (2008). *See also* PEDRO MALAVET-VEGA, DERECHOS Y LIBERTADES CONSTITUCIONALES EN PUERTO RICO 589 & n.1454 (2003) (the note discusses the controversy that arose as a result of the rather curious timing of the amendment to the statute).

[213] Therefore, until they were granted U.S. citizenship in 1917, Puerto Ricans were, in the words of a Democratic U.S. senator, "without a country. Can any man conceive of a more tyrannical form of government?" CARR, *supra* note 82, at 36 (citation omitted). Under international law, Puerto Rican citizenship is not recognized. *Id.*

[214] U.S. CONST. amend. XIV, § 1. The section continues as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

As noted by Professor Sarah H. Cleveland, the treatment of territorial citizens fits within a disturbing pattern of constitutional rules that are designed to have discriminatory effects on "discrete and insular minorities"[218] within the United States: territorial citizens, American Indians, and immigrants in our territory.[219] "The Indian, alien, and territory cases often have been ignored by mainstream constitutional law scholars as late-nineteenth-century anomalies of American constitutional jurisprudence. The doctrines developed during this period, however, continue to be the controlling constitutional authority in all three areas."[220]

For example, the "plenary power" doctrine—giving almost absolute deference to Congress to legislate the treatment of immigrants—initially developed in the nineteenth century shortly before the Spanish-American War,[221] remains in effect.[222] As Dean Kevin R. Johnson concludes: "The Supreme Court has consistently refused to disturb discriminatory immigration laws. As Justice Frankfurter put it, 'whether immigration laws have been crude and cruel, whether they have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress.'"[223] Whether the Puerto Ricans were, to the United States, citizens, alien immigrants, or something else, was unclear after the Spanish-American War. It was initially left to the Supreme Court rather than to Congress to define it.

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[215] *See* discussion *supra* notes 172-77 and accompanying text (discussing *Johnson v. M'Intosh* and *Scott v. Sanford*).

[216] To this limited study, we might add the mistreatment of Native Americans and Native Hawaiians. *See* Eric K. Yamamoto, Carrie Ann Y. Shirota, & Jayna Kanani Kim, *Indigenous Peoples' Human Rights in U.S. Courts, in* MORAL IMPERIALISM: A CRITICAL ANTHOLOGY 300-19 (2002).

[217] As detailed by Guadalupe Luna, Mexicans were dispossessed of their land despite their formal U.S. citizenship and their legal rights. Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife,"* 4 MICH. J. RACE & L. 39 (1998). *See also* RACE AND RACES, *supra* note 5, at 262.

[218] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.") (citations omitted).

[219] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

[220] *Id.* at 12. Professor Cleveland identifies two other scholars who have also discussed this pattern: T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002), and Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427 (2002). Cleveland, *supra* note 219, at 13 n.50 and accompanying text.

Article IX of the Treaty of Paris provided that:

> Spanish subjects, *natives of the Peninsula*, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. . . .
>
> The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.[224]

Although the *peninsulares* (natives of the Iberian Peninsula) were given the choice of retaining their Spanish citizenship, the native-born Puerto Ricans were not; they lost the Spanish citizenship that had been granted in late 1897. Yet again, the island's native inhabitants became subjects, but not citizens, of a colonial power. Despite the language of the Treaty, until Congress acted on the matter, the legal citizenship of Puerto Rico's non-Spanish inhabitants would be defined by the U.S. courts, initially and enduringly, in *Downes v. Bidwell.*

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[221] *See* Ping v. United States, 130 U.S. 581, 606 (1889) (also known as *The Chinese Exclusion Case*; if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . [that] determination is conclusive upon the judiciary.").

[222] *See* Demore v. Kim, 538 U.S. 510, 521 (2003) (citation omitted) (reasserting Congress' "broad power over naturalization and immigration").

[223] Kevin R. Johnson, *Minorities, Immigrant and Otherwise,* 118 YALE L.J. POCKET PART 77 (2008), http://thepocketpart.org/2008/10/28/johnson.html (citing Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

[224] *Treaty of Paris, 1898, in* 1 P.R. LAWS ANN., at 20 (2008) (emphasis added).

Downes effectively defined the legal rights of the inhabitants of the territories of the United States, and the power of the federal executive and legislative branches to regulate the land and its people. The case concerned the power of the federal government towards persons under our control who are, sometimes irrespective of citizenship status, racialized as something "other" than "Americans." Racism, supported by social Darwinism as pseudo-science, generally justified the take over of the lands belonging to "inferior races."[225] However, what "racial superiority" entailed had to be recast during the period of the Insular Cases.

Westward "manifest destiny" defined Anglo-white racial supremacy as making that group capable of "outbreeding" the "inferior" races. Reginald Horsman explains:

> By the 1850s the American sense of idealistic mission had been corrupted, and most of the world's peoples were condemned to permanent inferiority or even to extinction. General world progress was to be accomplished only by the dominating power of a superior race, and a variety of lesser races were accused of retarding rather than furthering world progress. A traditional colonial empire had been rejected [in the continental United States], but it was believed that the expansion of a federal system might ultimately prove possible as American Anglo-Saxons outbred, overwhelmed, and replaced "inferior" races. This time was to be hastened by commercial penetration of the most distant regions of the earth . . . .[226]

Once the United States reached the island territories, however, biological reality required white racial supremacy to redefine itself no longer to mean that the "superior" race could

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[225] *See generally* REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981).

[226] *Id.* at 297.

"outbreed" the "inferior" one. Rather, now it was the "inferior" race that bred like rats or cockroaches, or, at least, enough that it could not be displaced by white anglo immigration. While explaining the rule of the Insular Cases, as discussed later in this section, the Supreme Court acknowledged that Puerto Rico and other territories occupied as a result of the Spanish-American War could not be colonized by an Anglo-Saxon majority.[227] New Dealer Rexford G. Tugwell—the last non-Puerto Rican appointed Governor of the island—illustrates the United States' racialization of Puerto Ricans, and its views of fertility. When Tugwell was the secretary of agriculture, he accompanied First Lady Eleanor Roosevelt on her trip to Puerto Rico in March 1934, about which he wrote:

> I rather dislike to think that our falling fertility must be supplemented by these people. But that will probably happen. Our control of the tropics seems to me certain to increase immigration from here and the next wave of the lowly . . . succeeding the Irish, Italians, and Slavs . . . will be these mulatto, Indian, Spanish people from the south of us. They make poor material for social organization but you are going to have to reckon with them.[228]

The Spanish-American War thus left the United States in charge of new subjects who were clearly cast as "racially inferior." At the same time, the war acted as uniter of white southerners and northerners against a common enemy. In particular, the war served as a military reconciliation between white officers of the former confederate armed forces and the professional military establishment. In his inaugural address at the start of his second term on March 4, 1901, President McKinley noted this phenomenon when he stated that as a result of the Spanish-American War, "We are reunited. Sectionalism has disappeared. Division on public questions can no longer be traced by the war maps of 1861."[229] On Memorial Day on May 30, 1905, Senator Foraker, for whom Puerto Rico's organic act of 1900 was named, delivered an address as part of his work to have the graves of confederate soldiers in northern cemeteries "treated with due respect," which illustrates this concept more explicitly. He said:

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[227] *See* discussion *infra* notes 232-34 and accompanying text (concerning *Balzac*).

[228] ARTURO MORALES CARRIÓN, PUERTO RICO: A POLITICAL AND CULTURAL HISTORY 232 (1983).

> The Spanish-American war was attended with many good results, but one of the best was the impetus it gave to the restoration of cordial relations and the spirit of union and Americanism throughout the country. It gave the young men of the South an opportunity to put on the blue and show their loyalty and devotion to the flag, and to win, as they did, a heroic share of the glory and greatness that were added to the Republic; while their representatives in public life distinguished themselves by the conspicuous and patriotic character of their utterances and services. What has followed is but the natural result, and every survivor of the Union Army should be profoundly thankful that his life has been spared to see such a complete vindication of all that for which he contended.[230]

The racial paradigm that would prevail after North-South white reconciliation would be that of Southern white supremacy. Rubin Francis Weston explains:

> Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the Reconstruction period, an attempt at political equality for dissimilar races, or was it to be the Southern "counterrevolutionary" point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period and the relegation of the Negro to a status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority

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[229] William McKinley, *Second Inaugural Address of William McKinley: Monday, March 4, 1901*, THE AVALON PROJECT: DOCUMENTS IN LAW, HISTORY AND DIPLOMACY, http://avalon.law.yale.edu/19th_century/mckin2.asp (last visited Mar. 15, 2010).

[230] *Address of Senator Foraker at Arlington, Memorial Day, May 30, 1905*, ARLINGTON NATIONAL CEMETERY WEBSITE, http://www.arlingtoncemetery.net/foraker-1905.htm (last visited Mar. 15, 2010).

> was to be applied to the overseas possessions of the United States.[231]

In adopting the incorporated/unincorporated territories categories created by Justice White, *Balzac* constitutionally constructs the U.S. citizenship of Puerto Ricans as second class as long as they remain on the territory of Puerto Rico. It distinguishes between the rights of U.S. citizens living in Puerto Rico and U.S. citizens living in "the United States proper." The Court expressly indicates that as long as they choose to remain on the island, Puerto Ricans who are U.S. citizens will not enjoy the full rights of American citizenship. It thus also distinguishes between Puerto Ricans as individual U.S. citizens and as collective inhabitants of Puerto Rico. As individuals, they are free "to enjoy all political and other rights" granted to U.S. citizens *if* they "move into the United States proper." But as long as they remain on the island, they cannot fully enjoy the rights of U.S. citizenship.[232] The Supreme Court explained the motivation behind this construction of Puerto Rican second-class citizenship in nativistic terms when it distinguished the island from Alaska:

> Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement *by American citizens*. It was on the American continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents . . . .[233]

This statement, which is the Court's interpretation of the Act giving U.S. citizenship to Puerto Ricans, clearly assumes that Puerto Rican U.S. citizens are not the "American citizens" who could resettle an "American" state. While recognizing the impossibility of creating an Anglo-Saxon majority on the island, the Court also constructed Puerto Ricans as "others." Because Puerto Ricans are so "other," the incorporation of the territory that they populated into the United States could not be inferred; it had to be clearly expressed by Congress.[234] The rule of the Insular Cases, which the Court consistently mischaracterizes as "situational" and "transitional" vis-à-vis any one territory, has allowed Congress to maintain our island empire by constitutional default for over a century.

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[231] RUBIN FRANCIS WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946, at 15 (1972) (footnote omitted). Cornel West described the normative paradigm of "American" liberalism that produced these injustices. *See* Cornel West, *The Role of Law in Progressive Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 708, 709 (David Kairys ed., 3d ed. 1998).

[232] Balzac v. Porto Rico, 258 U.S. 298, 311 (1922).

[233] *Id.* at 309 (emphasis added).

CONCLUSION: A *DOWNES* RULE FOR CITIZENS THAT THE *BOUMEDIENE* COURT REFUSES TO SEE

As the *Boumediene* opinion pushes two years of age, its historical and precedential foundation in the Insular Cases is not substantially and seriously discussed, and is even less understood, in legal discourse in the United States. More generally, the Insular Cases are but legal footnotes in U.S. legal scholarship, outside of Critical Race Theory generally[235] and Lat-

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[234] Again, the Supreme Court is rather clear in *Balzac*:

> The jury system needs citizens trained to the exercise of the responsibilities of jurors. . . . Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.

Id. at 310.

[235] All the works are simply too numerous to be referenced here, but I cite many of them in the notes to this article. More generally, Cornell West writes that:

> Critical Race Theory is the most exciting development in contemporary legal studies. This comprehensive movement in thought and life—created primarily, though not exclusively, by progressive intellectuals of color—compels us to confront critically the most explosive issue in American civilization: the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation).

Cornel West, *Foreword* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).

Crit Theory in particular.[236] Professor Christina Duffy Burnett does identify some significant, although, as she notes, not broad-based progress in their incorporation into the traditional law school curriculum, particularly the work of constitutional law scholar Sanford Levinson and his inclusion of a section dedicated to the Insular Cases in his Constitutional Law casebook.[237] But Professor Levinson's call for *Installing the Insular Cases into the Canon of Constitutional Law* unfortunately appears to have been heeded only by himself in the world of Constitutional law casebook and treatise authors,[238] once again, outside CRT.[239]

In spite of the substantial work of Critical Race Scholars and of Professor Levinson's casebook, more law students today will study Justice Edward Douglass White's interpretation of the Sherman Antitrust Act than his views on the Territorial

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[236] *See supra* note 5 and accompanying text. "LatCrit" stands for "Latina and Latino Critical Race Theory." *See* Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1089 n.2 (1997) (undertaking the "difficult process" of defining LatCrit). For my personal take on the literature, see Pedro A. Malavet, *Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit*, 33 U.C. DAVIS L. REV. 1293 (2000); Pedro A. Malavet, *The Accidental Crit II: Culture and the Looking Glass of Exile*, 78 DENV. U. L. REV. 753 (2001); and Pedro A. Malavet, *The Accidental Crit III: The Unbearable Lightness of Being . . . Pedro*, *in* PROFESSIONAL FORBEARANCE: NARRATIVES FROM MINORITY LAW PROFESSORS ABOUT SURVIVING THE AMERICAN ACADEMY (Karla Erickson & Angela Onwuachi Willig eds., forthcoming 2011).

[237] PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 385-98 (Paul Brest et al. eds., 5th ed. 2006).

[238] Sanford Levinson, *Installing the* Insular Cases *into the Canon of Constitutional Law*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 121, 123 (Christina Duffy Burnett & Burke Marshall eds., 2001) (noting that the Insular Cases were not extensively discussed in any of the "contemporary constitutional law casebooks or treatises"). *See also* Sanford Levinson, *Why the Canon Should be Expanded to Include* The Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 241-66 (2000). Both works are referenced along with the continued dearth of coverage in *A Convenient Constitution*, *supra* note 5, at 985 & n.31, 986 & n.34, 1036 & n.211, 1040 & n.224, 1041 & n.225.

[239] *See, e.g.*, *The Story of* Downes, *supra* note 1, RICHARD DELGADO ET AL., *supra* note 5, at 52-64 (in the chapter on Puerto Rico and Puerto Ricans, note the section dedicated to *Downes v. Bidwell* and *Balzac v. Porto Rico*); RACE AND RACES, *supra* note 5, at 359-69.

Clause.[240] The Fuller Court is often remembered in law schools for declaring the national income tax[241] and a state law prohibiting more than sixty hours in a work-week unconstitutional.[242] Its most famous case is *Plessy v. Ferguson.* Except for Joseph McKenna, who had been appointed by President McKinley to replace the retiring Justice Stephen J. Field, in January of 1898,[243] all the members of the Fuller Court when it decided *Downes* had been appointed prior to 1898 and were members of the Court that decided the notorious *Plessy v. Ferguson* in 1896; a decision in which Justice Brewer did not participate and Justice Harlan dissented.[244] While the "separate but equal" standard of *Plessy* was relegated to the historical trash bin by *Brown v. Board of Education*,[245] the *Downes* decision is still good law, as clearly stated in *Boumediene*.

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[240] "The 'rule of reason' became the standard for applying the Sherman Antitrust Act after the Court's opinions in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), both written by White." PRATT, *supra* note 165, at 6 n.24.

[241] Pollock v. Farmer's Loan & Trust Co., 158 U.S. 601 (1895). Reversed by the 16th Amendment.

[242] Lochner v. New York, 198 U.S. 45, 53 (1905) (invalidating New York penal statute forbidding employers from requiring workers to exceed 60 hours in a work week). *Cf.* Muller v. Oregon 208 U.S. 412, 423 (1908) (upholding law restricting women working in laundries to no more than ten hours a day).

[243] *See* 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 861 (Leon Friedman & Fred L. Israel eds., Chelsea House Publishers 1969) [hereinafter 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT]. Field had been appointed to the Court by President Abraham Lincoln in 1863! S*ee also* 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 534 (Leon Friedman & Fred L. Israel eds., 1969).

[244] Plessy v. Ferguson, 163 U.S. 537 (1896) (7-1 decision written by Brown; Harlan dissented). A law review article explains why Justice Brewer, who had joined the Court in 1890, did not participate in the decision:

> The final line of the United States Supreme Court opinion in the landmark case of *Plessy v. Ferguson* states, 'Mr. Justice Brewer did not hear the argument or participate in the decision of this case.' Because of the untimely death of his daughter, the 58-year old Justice had been forced to leave Washington, D.C. for his home in Leavenworth, Kansas, on April 13, 1896, the day *Plessy* was argued before the Court. Without Brewer, the Court voted 7 to 1 to uphold Louisiana's 'separate but equal' public accommodations law. Only Justice John Marshall Harlan, a former slaveholder from Kentucky, agreed that the challenged 'Jim Crow' statute violated the Fourteenth Amendment's guarantee of equal protection of the laws.

J. Gordon Hylton, *The Judge Who Abstained in* Plessy v. Ferguson*: Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315, 315-16 (1991).

By relieving Congress, the President and itself of most constitutional limitations on the exercise of their discretion, the Supreme Court in *Downes* intended to allow the government some flexibility in dealing with our new territorial possessions. That flexibility has now become a permanent system for the regulation of our island empire, rather than a transitional process, as it was for the Philippines and Cuba—Guantánamo and the Platt Amendment notwithstanding. The use of the cases by the Court in *Boumediene* changes nothing about that; rather, it reasserts the doctrine of the Insular Cases perhaps in even more dangerous form.

President George W. Bush's appointees to the Supreme Court, Chief Justice Roberts and Associate Justice Alito, sided with his administration in the dissents in *Boumediene*.[246] Such loyalty from justices to the administration that appointed them is nothing new and it played an important role in the Insular Cases. As discussed above, the majority opinions in the cases resolved in 1901 were joined by Republican appointees who sided with a Republican President, and the dissents were issued principally by Democratic presidential appointees.[247] The late Chief Justice William H. Rehnquist in his book *The Supreme Court*[248] discusses how President Theodore Roosevelt demanded to know how Oliver Wendell Holmes would vote on the Insular Cases before he would nominate him to replace the retiring Horace Gray on the Supreme Court. In a letter to Holmes' sponsor, Senator Henry Cabot Lodge, Roosevelt wrote:

> The majority of the present Court who have, although without satisfactory unanimity, upheld the policies of Presi-

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[245] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[246] Boumediene v. Bush, 553 U.S. 723, 801 (2008) (Roberts, C.J., dissenting, joined by Scalia, Thomas & Alito, J.J.); *Id.* at 826 (Scalia, J., dissenting, joined by Roberts, C.J., Thomas & Alito, J.J.). *See also supra* note 10 and accompanying text ("President George W. Bush nominated [Roberts] as Chief Justice of the United States, and he took his seat on September 29, 2005;" "President George W. Bush nominated [Alito] as an Associate Justice of the Supreme Court, and he took his seat on January 31, 2006.").

[247] *See supra* note 165 and accompanying text.

[248] WILLIAM H. REHNQUIST, THE SUPREME COURT 215-17 (2001).

> dent McKinley and the Republican party in Congress, have rendered a great service to mankind and to this nation. The minority—a minority so large as to lack but one vote of being a majority—have stood for such reactionary folly as would have hampered well-nigh hopelessly this people in doing efficient and honorable work for the national welfare, and for the welfare of the islands themselves, in Porto Rico and the Philippines. No doubt they have possessed excellent motives and without doubt they are men of excellent personal character; but this no more excuses them than the same conditions excused the various upright and honorable men who took part in the wicked folly of secession 1860 and 1861.
>
> Now I should like to know that Judge Holmes was in entire sympathy with our views [on the Insular Cases] . . . .[249]

Rehnquist then concludes that "Holmes was duly appointed an associate justice [effective December 8, 1902[250]], and largely fulfilled Roosevelt's expectations of him with respect to the so-called Insular Cases, which were a great issue at that time, although they are scarcely a footnote in a text on constitutional law today."[251]

As already discussed, the late Chief Justice is of course correct that *Downes* and the Insular Cases have been treated as a legal footnote for much of the past century. But they should not be. I had hoped that *Boumediene* would at least produce serious discussions of the decisions, but I am disappointed by the relatively small number of articles published after the decision that really address the issue. After all, *Downes* and the Insular Cases, as Teddy Roosevelt's litmus test for appointment of one of the best-remembered justices in history indicates, were critical decisions determining the kind of country that the United States was to become. *Boumediene* is easily understood as a decision that defines the country that we are today. But, *Downes* is also our living constitutional doctrine and it daily affects the lives of millions of our citizens by creating an underclass of citizenship and United States territory in a permanent state of constitutional uncertainty about its future.

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[249] *Id.* at 216.

[250] 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT, *supra* note 243, at 878.

[251] REHNQUIST, *supra* note 248, at 217. As was discussed in section VI above, Oliver Wendell Holmes acquiesced in the continued imposition of the White doctrine in the Insular Cases, but did not expressly embrace it; though if he disagreed he might have issued one of his now well-regarded dissents.

The "wartime" moments of 1898 and 2010 are more similar as far as the law is concerned than is generally realized. The Spanish-American War and the so-called War on Terror produced military engagements that involved a commitment of our armed forces and cost lives, innocent and not, on all sides of the conflicts. At the same time, the armed conflicts produced the need to make important decisions about how our Constitution should be applied to the emerging and perhaps unanticipated results of military victory and accompanying extended control over territory and people. On both occasions, the Supreme Court took a racialized "us vs. them" approach. That is, the Court believed that "grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production."[252]

While many will be seduced by the ruling's legitimate grant of habeas relief to the detainees, the articulated rationales underlying the *Boumediene* decision are deeply troubling. The Court reasserted a rule of plenary power over territorial citizens while barely acknowledging those citizens' existence and without recognizing the duration of the occupation of the current United States territories. The majority may have cast new doubt on the applicability of fundamental rights guaranteed by the Bill of Rights to the territorial citizens. Then, without any sense of irony, the Court discussed the Philippines and its "transition to independence," rearticulating in the process the doctrine of the Insular Cases as an *old* and *well-established* rule to be flexibly applied to *temporary and transitional* situations. The majority then placed what is currently happening in Guantánamo Bay in the category of these temporary situations.

The fallacy of those assumptions casts serious doubt on the soundness of *Downes v. Bidwell* and *Boumediene v. Bush.*

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[252] Boumediene v. Bush, 553 U.S. 723, 757 (2008) (citing Downes v. Bidwell, 182 U.S. 244, 282 (1901)).

The *Boumediene* Court did not in any way recognize that over four million souls currently live under the rule of the Insular Cases *and have done so for over a century.* This means that the majority's reliance on the Insular Cases, and the dissenters' acceptance of their rule, are very inaccurately characterized in *Boumediene.* The only counter to such mischaracterizations of the cases is to go back to their original context—which this article has attempted to lay out only a very broad terms—and to acknowledge their continuous application for a period of over one hundred years to a particular group of current U.S. citizens.

Indeed, on the basis of this continuous relationship, Judge Gustavo Gelpí, of the United District Court for the District of Puerto Rico recently wrote:

> Let it be clear. The court today is in no way attempting to overrule the *Insular Cases* as applied to the U.S. territories—only the Supreme Court can. The court, rather, today holds that in the particular case of Puerto Rico, a monumental constitutional evolution based on continued and repeated congressional annexation has taken place. Given the same, the territory has evolved from an unincorporated to an incorporated one. Congress today, thus, must afford Puerto Rico and the 4,000,000 United States citizens residing therein all constitutional guarantees. To hold otherwise, would amount to the court blindfolding itself to continue permitting Congress *per secula seculorum* to switch on and off the Constitution. [Citing *Boumediene*].[253]

In the accompanying footnote Judge Gelpí clarifies that this is not a statement about statehood, but rather about incorporated territorial status, and that he bases his decision on *Boumediene* itself:

> The issue of statehood for Puerto Rico is not before this court. As mentioned at the outset of this opinion . . . the issue before the court pertains exclusively to civil rights and not status politics. May Congress, by allowing Puerto Rico to remain in

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[253] Consejo de Salud v. Rullan, 2008 U.S. Dist. LEXIS 107905, *62 & n.30 (D.P.R. Nov. 10, 2008).

> limbo between a mere territory and a state, indefinitely (versus "temporarily") preclude the Constitution from applying to the United States territory and citizens residing therein? *Boumediene* is clear that it may not. As Article IX of the Treaty of Paris recognizes, "civil rights" and "political conditions" are distinct concepts.[254]

Unfortunately, this particular opinion in an otherwise long litigation was never appealed[255] and in April of this year the underlying complaint was voluntarily dismissed.[256] Judge Gelpí's short-lived opinion is a step in the right direction because it challenges the fallacy that Puerto Rico's legal relationship to the United States is a "temporary" issue. But the matter remains in the hands of the Supreme Court and the United States Congress with the severe flaws and limitations that this article has sought to illuminate.

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[254] *Id.* at *62 n.30

[255] For a brief overview of this litigation see Concilio de Salud Integral de Loiza, Inc. v. Pérez-Perdomo, 551 F.3d 10 (1st Cir. 2008).

[256] Consejo de Salud Playa de Ponce v. Sec'y of Health of P.R., 2010 U.S. Dist. LEXIS 37660 (D.P.R. Apr. 14, 2010). Judge Gelpí noted in his order that there had been a change in political administration in Puerto Rico following the elections of November 2008, after his original opinion on the Insular Cases was issued, and that the new administration had taken a different position on the constitutional matter. *Id.* at *6 n.1. That said, in allowing the dismissal, he explained:

> The parties, nonetheless, agree that the recent enactment of the American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115, and the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 124 Stat. 1040, favorably alter the congressional treatment of the Commonwealth under the Medicaid Statute. In light of said changed scenario, the Commonwealth, in particular, understands that "it is not in the best interest of its constituents to further pursue the constitutional challenges under such circumstances".

THE STATUS OF AFRICAN AMERICAN MALES IN THE LEGAL PROFESSION: A PIPELINE OF INSTITUTIONAL ROADBLOCKS AND BARRIERS

Floyd Weatherspoon[*]

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[*] Professor, Capital University Law School (Columbus, Ohio). I am grateful to Elliott Dawes, Director of City University of New York Black Male Initiative, for inspiring me to write this article. I wish to thank my research assistants Scott McKinney, Louie Smith, and Dustin Schock for their assistance. I am especially grateful to my research assistant Josh Farnsworth for reviewing draft after draft of this article. I also wish to thank Professor Vernellia Randall, University of Dayton Law School, and Linda Mihely, Assistant Dean of Admission & Financial Aid, Capital University Law School, for providing guidance on admission statistics. A short essay version of this article has previously been published as a book chapter under the title "Under-representation of African-American Males in the Legal Profession: Breakages in the Pipelines," in, BLACK AMERICAN MALES IN HIGHER EDUCATION: RESEARCH, PROGRAMS AND ACADEME (Henry T. Frierson et al. eds., Emerald Group Publishing 2009).

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INTRODUCTION

Very few African American males complete the long and daunting journey to enter and advance in the legal profession. It is a journey with institutional roadblocks and barriers that prohibit their entrance and advancement as lawyers. The number of African American males entering the legal profession remains stagnant, with only marginal increases during the past fifteen years. Even though the U.S. Supreme Court declared the intentional exclusion of African American males from state law schools unconstitutional more than fifty years ago,[1] other neutral institutional policies and requirements have stifled the growth and development of African American males attending law school and advancing in the legal profession. Even with these legal victories, African American males still confront institutional practices that exclude them from entering the legal profession.

Many law schools have developed aggressive recruitment programs to attract African American males to attend law school. Law schools have also developed academic support programs for those students who attend. These efforts, however, have only minimally ameliorated the barriers that African American males face in their pursuit of careers in the legal profession. And even prior to law school, the roadblocks and obstacles along the pipelines to the legal profession prevent many African American males from becoming attorneys. One misstep on the pipelines can derail a student's dream of becoming an attorney. African American males who advance along the pipelines often face insurmountable educational stumbling blocks: a criminal justice system that incarcerates mass numbers of young African American males, law school institutional barriers, racial isolation while in law school, lack of role models in the legal profession, and draconian testing and admission policies. Even African American males who graduate from law school may face insidious discriminatory hiring practices, particularly in the private sector. These factors, plus others, negatively impact the pool of young African American male students who could have successful legal careers as attorneys in private practice, prosecutors, public defenders, judges, or law professors.

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[1] Sweatt v. Painter, 339 U.S. 629 (1950).

African American males play a major role in our American legal system not as lawyers, judges, or prosecutors, but as defendants in criminal proceedings. Indeed, on any given day and almost in any criminal court or juvenile justice system, African American males will be defendants, represented by a court appointed white attorney, prosecuted by a white prosecutor, sentenced by a white judge, and ultimately incarcerated and guarded by white prison guards.[2] Incarceration, not education, is the pipeline that far too many young African American males disproportionately travel. The absence of African American males in the legal profession creates a climate of hostility and a lack of trust toward the American justice system, which prosecutes and incarcerates mass numbers of African American males.[3] Moreover, a number of studies concluded that the court system treats African Americans differently: bail-setting is higher for African Americans than white defendants, African Americans receive longer sentences than whites who commit similar crimes, and African Americans are more likely to be sentenced to death when the victim is white.[4] Thus, the current state of African American males in the criminal justice system may negatively affect the motivation of many young African American males to pursue a career in the legal profession.[5]

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[2] *See* Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 37 (1994).

[3] Supreme Court Justice Sandra Day O'Connor stated in a speech before the Ninth Circuit Judicial Conference that "[w]hen people perceive . . . bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law." Hon. Sandra Day O'Connor, Justice, Supreme Court of the United States, Speech Delivered to the Ninth Circuit Judicial Conference in Sun Valley, Idaho: The Quality of Justice (Aug. 6, 1992), *in* 67 S. CAL. L. REV. 759, 760. Because African Amer-

In 2004, the American Bar Association's Commission on Racial and Ethnic Diversity in the Legal Profession (ABA) completed a broad and comprehensive review of minorities in the legal profession. The ABA entitled the study, *Miles to Go: Progress of Minorities in the Legal Profession*.[6] The study reviewed data on minorities in the profession to determine "the profession's progress toward 'full and equal' racial integration."[7] The study concluded that minorities face major obstacles to enter into and advance in the legal profession.[8] In 2005, the ABA held a national conference to explore ways that the "pipeline" to the legal profession could be expanded to ensure diversity. The ABA issued a post-conference report entitled, *Embracing the Opportunities for Increasing Diversity Into the Legal Profession: Collaborating to Expand the Pipeline*, which summarized the "range of strategies and solutions" for enhancing diversity in the legal profession.[9]

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ican males are negatively impacted at every step of the criminal justice system, they may reasonably perceive biases in the legal system. *See* Weatherspoon, *supra* note 2, at 62.

[4] Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 & nn.1–3 (2009).

[5] *Cf.* Shaun R. Harper, *Race, Interest Convergence, and Transfer Outcomes for Black Male Student Athletes*, 147 NEW DIRECTIONS FOR COMMUNITY COLLEGES 29, 32 (2009) (discussing the motivations of African American males to play professional sports).

[6] ELIZABETH CHAMBLISS, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (ABA Commission on Racial and Ethnic Diversity in the Legal Profession 2004) [hereinafter MILES TO GO].

[7] *Id.*

[8] *Id.*

[9] *Embracing the Opportunities for Increasing Diversity Into the Legal Profession: Collaborating to Expand the Pipeline (Let's Get Real)*, A.B.A. POST-CONF. REP. (ABA, Office of Diversity Initiatives, Chicago, Ill.) 2006, at 6, *available at* http://www.abanet.org/op/pipelineconf/PipelinePostReport.pdf.

Local and state bar associations,[10] law firms,[11] the ABA,[12] and many other organizations committed to increasing diversity in the legal profession[13] have implemented many of these strategies and programs. Unfortunately, the pipelines for African American male students fail to lead directly to law school and into the legal profession.

Except for the ABA reports, very few studies and reports conducted on the status of African American males in the legal profession separated them from other minority groups. Moreover, studies often combine the data on African American males in the legal profession with African American females. By reporting on the status of African American men with African American women and other minorities, many studies have overlooked the fact that little progress has been made to increase the number of African American males in the legal profession. The reasons for the absence of African American males in the legal profession are often the same as with other groups, but African American males also face a number of unique obstacles and barriers.[14] Therefore, this article focuses specifically on the status and plight of African American males in the legal profession.

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[10] *See, e.g.*, Ruthe Catolico Ashley, *The Leaking Pipeline: Diversity in the Legal Profession*, Sacramento Law., Mar./Apr. 2008, at 12–13; Am. Bar Ass'n, Pipeline Diversity Directory: State Bar of Texas Pipeline Program, (June 3, 2009), http://new.abanet.org/PipelineDiversity/Lists/Pipeline%20Diversity%20Directory/DispForm.aspx?ID=57; Va. State Bar, Diversity Task Force Pipeline Projects Work Group (2009), http://www.vsb.org/docs/compilation-div-060809.pdf; State Bar of Ariz., Diversity Dep't, http://www.myazbar.org/diversity/; A.B.A. & LSAC, Pipeline Diversity Directory, http://new.abanet.org/PipelineDiversity/Pages/DirectoryHome.aspx; Marian Cover Dockery, *Fueling the Pipeline: State Bar of Georgia Diversity Program's 15th Annual CLE and Luncheon*, Ga. B.J., Dec. 2007, at 52.

[11] Ass'n for Legal Career Profs., Member Diversity Initiatives, http://www.nalp.org/memberdiversityinitiatives (last visited Sept. 26, 2010) (listing diversity programs designed to increase the number of minorities in the legal community).

[12] The American Bar Association maintains a comprehensive resource guide to legal diversity pipeline programs, funds a diversity scholarship, and sponsors an annual diversity summit. *See* Am. Bar Ass'n, Leadership, Diversity, http://www.abanet.org/leadership/diversity.html (last visited Sept. 26, 2010); *see also* Am. Bar Ass'n, Pipeline Diversity Directory, http://new.abanet.org/PipelineDiversity/Lists/Pipeline%20Diversity%20Directory/robin%20view.aspx (last visited Sept. 26, 2010).

[13] *See, e.g.*, Veta T. Richardson, *Building a Pipeline of Diverse Lawyers*, Diversity & Bar, July/Aug. 2004, http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=477.

[14] *See* D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 Neb. L. Rev. 552, 564-68 (2008) (discussing the

Representing a rich tradition, African American male lawyers successfully advocated for the end of segregation of law schools and for the admittance of African American students to white law schools. Section II of this article provides a summary of these historical civil rights cases that slowly opened the pipelines for African American male students to attend segregated white law schools. Section III describes the present status of African American males in the legal profession. Section IV explores the underlying reasons for the declining enrollment of African American males into law school and ultimately the legal profession. Section V provides a brief overview of efforts being made to address these issues and suggests new approaches to enhancing the flow of African American males along the pipelines to the legal profession.

I. A HISTORY OF DISCRIMINATORY AND EXCLUSIONARY ADMISSION PRACTICES BY LAW SCHOOLS

There has been a lengthy history of racial exclusionary practices, which prohibited the admission of African American students, particularly males, into white public law schools.[15] Charles Hamilton Houston[16] and Thurgood Marshall, two African American male lawyers, led the fight for the admission of African Americans into white law schools through their bril-

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unique stereotypes typically assigned to African American males). For a discussion of the perceptions and problems that flow from African American incarceration from the perspective of a former black prosecutor, see PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 36-37 (2009).

[15] For a detailed discussion of the history of black lawyers, see J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER: 1844-1944 (1993); Kenneth S. Tollett, *Black Lawyers, Their Education, and the Black Community*, 17 HOW. L.J. 326 (1972); Don Corbett, *Stunted Growth: Assessing the Stagnant Enrollment of African-American Students at the Nation's Law Schools*, 18 TEMP. POL. & CIV. RTS. L. REV. 177 (2008) (providing a historical review of the challenges African Americans faced in attending law school, including Macon B. Allen, the first African American lawyer in the United States).

[16] For a discussion on the contributions Charles Houston made to the legal education system, see Leland Ware, *A Difference in Emphasis: Charles Houston's Transformation of Legal Education*, 32 HOW. L.J. 479 (1989).

liant advocacy.[17] One of their first cases, *Pearson v. Murray*,[18] challenged the practice of excluding African Americans from attending the University of Maryland Law School. Murray, an African American male, alleged that he was denied admission because of his race. The court of appeals held that while the separation of races was permissible, equal treatment was still required. Thus, requiring African American law students to travel out of state to attend law school violated the Equal Protection Clause of the Fourteenth Amendment. The court required the University to admit Murray since there were no separate law schools for African Americans in the state of Maryland.[19]

In 1938, Lloyd Gaines, an African American male, challenged the University of Missouri's policy of excluding African Americans from admission to law school. In *Gaines v. Canada*,[20] Gaines alleged that his denial of admission because of his race violated the Equal Protection Clause of the U.S. Constitution. Even though Gaines met the qualifications for admission to the law school, the University nevertheless denied his admission purely because he was an African American. He was directed to apply for state aid[21] to attend a law school in another state that admitted African Americans.[22]

The U.S. Supreme Court held that if the state provided higher education to white residents, it had to provide higher educational opportunities to black residents within the state, but not necessarily in the same school. *Gaines* opened the pipelines for African American students to receive legal training within the state, although it would be segregated.[23] The Gaines decision did not overrule *Plessy v. Ferguson*,[24] which upheld the separate but equal doctrine.

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[17] H. Timothy Lovelace, Jr., *Revisiting "The Need for Negro Lawyers": Are Today's Black Corporate Lawyers Houstonian Social Engineers?*, 9 J. GENDER RACE & JUST. 637, 658-59 (2006).

[18] 182 A. 590 (Md. 1936); *see also* Thurgood Marshall Law Library, Donald Gaines Murray and the Integration of the University of Maryland School of Law, http://www.law.umaryland.edu/marshall/specialcollections/murray (last visited July 12, 2010).

[19] *Pearson*, 182 A. at 594.

[20] 305 U.S. 337, 342 (1938).

[21] *Id.* at 342-43 (quoting MO. REV. STAT. § 9622 (1929)). Section 9622 provided that:

> Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance . . . .

Id.

[22] *Id.* at 343 (noting that adjacent states to Missouri, including Kansas, Nebraska, Iowa and Illinois, all admitted nonresident blacks to law school).

Twelve years after the *Gaines* decision, the U.S. Supreme Court was again confronted with the issue of whether the exclusion of an African American male from a state supported law school because of race violated the Equal Protection Clause of the Constitution. In *Sweatt v. Painter*,[25] an African American male applied and was denied admission to the University of Texas Law School. Sweatt alleged that the white law school had substantially more resources than the separate law school established for blacks.[26] The U.S. Supreme Court agreed with Sweatt and ordered his admission to the white law school. The Court held that Sweatt had been denied "privileges, advantages and opportunity to study law" in comparison to white law students.[27] Again, the Supreme Court refused to re-examine the separate but equal doctrine it first articulated in *Plessy*.[28] Even with the Court maintaining the doctrine of separate but equal, the Sweatt decision further opened the pipelines for African American students to attend white law schools.[29]

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[23] *See, e.g.*, Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948) (relying on Gaines v. Canada, 305 U.S. 337 (1938)) (holding that the State of Oklahoma was required to provide legal education to African American students in the all white law school, since there were no law schools for blacks).

[24] Plessy v. Ferguson, 163 U.S. 537 (1896); McCabe v. Atchison, T. & S. F. Ry. Co., 235 U.S. 152 (1914); Gong Lum v. Rice, 275 U.S. 78 (1927).

[25] 339 U.S. 629 (1950); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (challenging the issue of affirmative action and African American students' admittance to the Texas Law School almost fifty years later). *See generally* Laura C. Scanlan, *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. REV. 1580 (1996).

[26] *Sweatt*, 339 U.S. at 631–33; Marguerite L. Butler, *The History of Texas Southern University, Thurgood Marshall School of Law: "The House that Sweatt Built"*, 23 T. MARSHALL L. REV. 45 (1997); Katherine L. Chapman, *Texas Connection: The 50th Anniversary of* Brown v. Board of Education*: Do You Remember Heman Marion Sweatt?*, 67 TEX. B.J. 364 (May 2004) (providing a historical review of Sweatt's struggle to be admitted into law school); John Sirman, *Reflections of Black Law Students: U.T. Marks 50th Anniversary of* Sweatt v. Painter, 63 TEX. B.J. 650 (July 2000).

[27] *Sweatt*, 339 U.S. at 632–35. Similarly, in *Wilson v. Bd. of Supervisors*, 92 F. Supp. 986 (E.D. La. 1950), Thurgood Marshall successfully challenged the denial of Ray Wilson, an African American male who was subsequently admitted to the Louisiana State University Law School. For a historical discussion on ending the segregation of law schools in Louisiana, see Darrell K. Hickman, *Realizing the Dream:* United States v. State of Louisiana, 50 LA. L. REV. 583 (1990).

In 1954 the U. S. Supreme Court issued the seminal case *Brown v. Board of Education*,[30] which held that the separate but equal doctrine in segregated public schools violated the Equal Protection Clause under the Fourteenth Amendment. Specifically, the Court stated that the doctrine of separate but equal has no place in public education.[31] The Court also indicated that "[t]oday, education is perhaps the most important function of state and local governments."[32] The ending of the separate but equal doctrine and the Court's confirmation of the importance of education further opened the pipelines for African American students to apply to and attend state supported law schools, which had previously refused to admit African American students. The *Brown* decision, however, failed to have a major impact on the admission of African American students into white law schools.[33] Without a doubt, the number of African American students increased as a result of widespread integration, but the number of African American male lawyers remains considerably low in comparison to the total population of African Americans. Ironically, the *Brown* decision led to the unintended result of the closure of many black law schools that enrolled African American males.[34] Although black law schools served their purpose during the period governed by the separate but equal doctrine, the end of de jure discrimination undercut the need for black law schools because African American students could now attend integrated law schools. Consequently, the *Brown* decision also allowed for the mass closure and consolidation of black and white schools, especially in the South.

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[28] *Sweatt*, 339 U.S. at 636. *See Plessy*, 163 U.S. at 544-45 (1896).

[29] *See generally* Kenneth G. Standard & Nazneen Malik, *More Than 57 Years After* Sweatt v. Painter*, Racial Inequity Persists In Legal Education*, 16 THE METROPOLITAN CORP. COUNSEL 54 (2008); Jonathan L. Entin, Sweatt v. Painter*, The End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3, 7 n.13 (1986); William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1 (2003).

[30] 347 U.S. 483 (1954).

[31] *Id.* at 495.

[32] *Id.* at 493.

[33] Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, J. AM. HIST., June 1994, at 81.

[34] Julie Kay, *Saving the School, FAMU Law's Long, Troubled Road to ABA Accreditation*, ABA MAG., Jan. 2, 2010, http://www.abajournal.com/magazine/article/ saving-the-school/; Jeanita W. Richardson & J. John Harris III, *Brown and Historically Black*

Almost fifty years after the decision in *Brown*, the U.S. Supreme Court issued the highly divided decision of *Grutter v. Bollinger.*[35] In *Grutter*, the University of Michigan Law School used race, among other factors, in making admission decisions for entrance into the law school.[36] The law school's admission policy sought to ensure diversity among its students.[37] The Supreme Court held that the University of Michigan's program was narrowly tailored and furthered "a compelling state interest in obtaining the educational benefits that flow from a diverse student body."[38] Even though the *Grutter* decision was a victory for proponents of affirmative action, the decision did not prevent a decline in enrollment of African American students.[39]

Nevertheless, the *Grutter* decision in theory prevented a fragile pipeline for African American males to be admitted into law school from narrowing. However, after more than seventy years of state and federal litigation involving admission policies, the number of African American males attending law school and entering the legal profession remains low and continues to stagnate.[40]

Colleges and Universities (HBCUs): A Paradox of Desegregation Policy, 73 J. NEGRO EDUC. 75 (2004).

[35] 539 U.S. 306 (2003).

[36] *Id.* at 335. *See generally* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[37] *Grutter*, 539 U.S. at 315; *see also* Athena D. Matua et al., *Who Gets In? The Quest for Diversity After* Grutter, 52 BUFF. L. REV. 531 (2004).

[38] *Grutter*, 539 U.S. at 307. *But see* Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that the University of Michigan's undergraduate admissions policies violated the Equal Protection Clause because the university assigned one-fifth of the points needed for admission to minorities only because of their race).

[39] Michael Dobbs, *Drop in Black Admission*, WASH. POST, Nov. 22, 2004, at A1.

[40] The decline of African American law students inspired members of Congress to request an investigation by the General Accounting Office. *See* Diane Hayes, *Members of Congress Want Investigation into Black Law Student Decline*, DIVERSE EDUC., Oct. 8, 2006, http://diverseeducation.com/article/6491/1.php.

II. PRESENT STATUS OF AFRICAN AMERICAN MALES IN THE LEGAL PROFESSION

A. *The Stagnant Number of African American Male Lawyers*

African Americans represent approximately 12%[41] of the U.S. population, and 6% of the U.S. population are African American males.[42] In terms of actual numbers, the 2000 Census reported that there are 33,865 African American lawyers, 17,450 of whom are male, out of more than 800,000 lawyers.[43] A 2007 survey of employed civilians by occupation conducted by the U.S. Census indicated that African Americans represent 4.9% of the total lawyers in this country.[44]

The Law School Admission Council (LSAC) reported that "[o]nly 1 in 25 lawyers is African American, Latino, Asian American, or Native American."[45] These numbers clearly illustrate that minority groups are severely under-represented in the legal profession. African American males, in particular, are among the most under-represented groups. Based on the 2000 Census, African Americans represent 3.9% of lawyers in the country, of whom 2.0% are African American males.[46] Even though there has been some increase in the number of African

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[41] Jesse McKinnon, *The Black Population: 2000,* CENSUS 2000 BRIEF (U.S. Dept. of Com., Washington D.C.) Aug. 2001, at 1, *available at* http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf.

[42] Roughly 5.85% of the U.S. population as of the 2000 census reported their race as black or African American. This calculation is my own, taking the number of males reporting race as black or African American and comparing it to the total population. This number does not account for those men who reported two or more races. *See id.*; *see also Table 2. Male Population by Age, Sex, Race and Hispanic or Latino Origin for the United States: 2000,* CENSUS 2000 SUMMARY FILE (U.S. Dept. of Com., Washington D.C.), Oct. 3, 2001, *available at* http://www.census.gov/population/www/cen2000/briefs/phc-t9/tables/tab02.pdf.

[43] *See* ABA COMM. ON RACIAL & ETHNIC DIVERSITY IN THE PROF., STATISTICS ABOUT MINORITIES IN THE PROFESSION FROM THE CENSUS, http://www.abanet.org/minorities/links/2000census.html (last visited Sept. 26, 2010) (stating that there were 17,450 African American male lawyers (non-Hispanic) out of 871,115 total lawyers).

[44] *Employed Civilians by, Occupation, Sex, Race, and Hispanic Origin: 2009,* STATISTICAL ABSTRACT OF THE UNITED STATES: 2009 (U.S. Dept. of Com., Washington, D.C.), 2009, at 385, *available at* http://www.census.gov/prod/2008pubs/09statab/labor.pdf.

[45] *Pursue a Career in Law: Change the Odds*, LAW SCH. ADMISSION COUNCIL (LSAC Office of Diversity Initiatives) 2007.

[46] ABA, *supra* note 43.

American male lawyers during the past forty years, the increase has only been marginal.[47] One study of census data reported that "in 1960, 2.0% of male lawyers and judges ages 36-45 were African Americans. After several decades of litigation, affirmative action, and various initiatives, in 2000 the proportion in the same group has grown only modestly to 2.8% of male lawyers."[48]

B. Few African American Male Prosecutors

Very few African American lawyers are employed as prosecutors, and those who are only remain in their positions for a short period of time.[49] A typical prosecutor's office employs primarily young white male attorneys.[50] According to a recent study, African Americans represent 8% of all federal prosecutors—a disproportionately low number compared to the 13% of African Americans in the general population.[51]

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[47] The present number of African American lawyers reflects a substantial increase in the number of black lawyers from the one reported in the 1890 census. *See* Joseph Gordon Hylton, *The African-American Lawyer, the First Generation: Virginia as a Case Study*, 56 U. PITT. L. REV. 107 (1994). The pipelines that African Americans traveled to become attorneys after the Civil War were treacherous, hostile, and blatantly discriminatory. Today, however, the pipelines that African Americans must travel to become lawyers are not hostile and blatantly discriminatory but based on institutional policies and procedures, which result in the exclusion of African Americans from entering the legal profession. For a history of the struggle African Americans faced to become trained attorneys after the Civil War, see SMITH, *supra* note 15.

[48] James Lindgren, *The Private and Public Employment of African-American Lawyers, 1960-2000*, 17 J. CONTEMP. LEGAL ISSUES 281, 286 (2008).

[49] Black prosecutors may also leave their employment with the prosecutor's office because of a feeling of isolation from the African American community and because they may be labeled a "sell out." Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1473 (2002); *see* Lenese C. Herbert, Et in Arcadia Ego*: A Perspective on Black Prosecutors' Loyalty Within the American Criminal Justice System*, 49 How. L.J. 495 (2006).

[50] *See* Steve Fry, *All-White Team of Prosecutors Worries Black Leaders*, TOPEKA CAP. J., Jan. 24, 2001, at 1 ("Black leaders in Topeka are concerned that Shawnee County District Attorney Robert Hecht's office doesn't employ any black prosecutors."), *available at* http://findarticles.com /p/articles/mi_qn4179/is_20010124/ai_n11759151.

[51] Geoff Ward, Amy Farrell, & Danielle Rousseua, *Does Racial Balance in Workforce Representation Yield Equal Justice? Race Relations of Sentencing in Federal Court*, 43 LAW & SOC'Y REV. 757, 783 (2009) ("In 2001-2002, approximately 9 percent of all federal judges and 8 percent of federal prosecutors were black, slightly below the proportion of blacks in the U.S. population (13 percent) and the average black population by federal judicial district (12 percent)."). *Cf.* Jeffrey J. Pokorak, *Probing the Capi-*

There are few African Americans who advance through this pipeline to jobs in the most powerful public law office. There are a number of reasons why few African American lawyers work for prosecutors. One reason is that African American lawyers see first-hand the injustices of the criminal justice system.[52] It is a system where prosecutors disproportionately prosecute young African American males.[53] Day after day prosecutors in the juvenile justice system and in state and federal court systems charge and prosecute young African American males. Prosecutors disproportionately seek the death penalty for African American males in capital crimes,[54] use peremptory challenges to exclude African American males from serving on juries, [55] and target African American communities for strict enforcement of gun laws.[56]

Further, prosecutors exercise unbridled discretion in determining who will be criminally charged, prosecuted, or offered a plea bargain.[57] Unfortunately, there may be times when

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tal Prosecutor's Perspective: Race of the Discretionary Actors, 83 CORNELL L. REV. 1811, 1811–20 (1998) (conducting a 38-state survey of death penalty states and concluding that only 1.2% of top prosecutors are African American); Roscoe C. Howard, Jr., *Changing the System from Within: An Essay Calling on More African Americans to Consider Being Prosecutors*, 6 WID. L. SYMP. J. 139, 167 (2000) ("Blacks make up only 4% of the attorneys in the criminal justice system.").

[52] Ellis Cose, *Joe Frazier for the Prosecution*, *in* THE DARDEN DILEMMA 79-80 (Ellis Cose ed.,1997).

[53] BUTLER, *supra* note 14, at 37.

[54] McCleskey v. Kemp, 481 U.S. 279 (1987); Pokorak, *supra* note 51, at 1811–20.

[55] Batson v. Kentucky, 476 U.S. 79 (1986); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J.L. REFORM 229 (1993).

[56] *See generally* Bonita Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305 (2007); Dan Horn, *Bias Alleged in City Gun Cases: Police, Prosecutors Tougher on Blacks?*, CINCINNATI ENQUIRER, Nov. 7, 2003, at B1.

[57] ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 16 (2007). Finds that:

> [T]he lack of enforceable standards and effective accountability to the public has resulted in decision-making that often appears arbitrary, especially during the critical charging and plea bargaining stages of the process. These decisions result in tremendous disparities among similarly situated people, sometimes along race and/class lines. The rich and white, if they are charged at all, are less likely to go to prison than the poor and black or brown—even when the evidence of criminal behavior is equally present or absent.

prosecutors' unbridled discretion negatively impacts African American males. Even when prosecutors engage in misconduct during judicial proceedings, they are immune from law suits.[58] Proving that prosecutors have engaged in selective enforcement of the laws based on race is almost impossible because of the standards established by the Supreme Court.[59] These may be factors that cause young African American male lawyers to shy away from working in an environment where they must prosecute mass numbers of young African American males and engage in possible discriminatory conduct.

C. *Few Judges, Magistrates, and Other Judicial Workers*

Over the past several decades, few African American males progressed through the pipelines to become judges. Those who administer justice in this country are primarily white males.[60] White males and females represent approximately 83% of judges, magistrates, and other judicial workers.[61] According to the 2000 census, African American males represented 3.9% of judges, magistrates, and other judicial workers.[62] The number of African American male judges in some states was slightly higher than the national figures, but still disproportionately lower than other groups.[63] Appointing

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Id. See also Nunn, *supra* note 49, at 1491 (finding that "the overrepresentation of African Americans in the criminal justice system is due largely to the actions of prosecutors"); John L. Worall, *Prosecution in America: A Historical and Comparative Account*, *in* THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 3-27 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) ("American prosecutors exercise enormous discretion in terms of who gets charged.").

[58] Imbler v. Pachtman, 424 U.S. 409 (1976); Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009). *But see* McGhee v. Pottawattamie County, 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002.

[59] United States v. Armstrong, 517 U.S. 456 (1996); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605 (1998).

[60] *See* Michael Nava, *The Servant of All: Humility, Humanity, and Judicial Diversity*, 38 GOLDEN GATE U. L. REV. 175, 175 n.3 (2008) ("The dominance on the bench, both at federal level and in California, by White, upper-class, heterosexual males is so well-documented as to have become a truism.").

[61] ABA, *supra* note 43.

[62] *Id.*

[63] Elizabeth Chambliss, *Miles to Go in New York: Measuring Racial and Ethnic Diversity Among New York Lawyers*, 2007 REP. OF THE N.Y. ST. BAR ASS'N COMM. ON MINORITIES IN THE PROF. 9, *available at* http://www.nysba.org/Content/Navigation

African Americans to the federal bench may be more challenging than appointing white males.[64] A study of the 1980-2000 census data on African American lawyers ages 31-65 reports that African American male judges increased from 3.8% to 5.1%.[65] Even though there appears to be a modest increase in African American male judges, the numbers may be misleading because the ABA study includes other judicial personnel, which may inflate the numbers reported for African American male judges.

D. Lack of Diversity in Major Law Firms

A study on diversity in law firms by the U.S. Equal Employment Commission revealed that since 1975, the percentage of African Americans working in large law firms increased from 2.3% to 4.4%.[66] The study also revealed that African Americans employed as associates have "lower odds" of being promoted to partner.[67] While recently firms implemented a number of initiatives[68] to hire and promote African American lawyers, the overall numbers have increased only marginally.[69] A study of census data from 1980-2000 concluded that the employment of African American male lawyers by private law firms and companies only increased from 1.8% to 2.1%.[70] Moreover, few African American males moved through the law firm pipelines

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Menu36/CommitteeonMinoritiesintheProfessionHome/ExecutiveSummarypdf/DOC001.PDF.

[64] *See* Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" on the Bench*, 39 U. RICH L. REV. 849 (2005) (contending that white male nominees for Federal Court appointments progress through the process in a shorter time period than African American nominees).

[65] Lindgren, *supra* note 48, at 285 ("[I]t is hard to determine how much of this effect might be the result of expanding the category of 'Judges' in the 1960-1990 Censuses to include 'other Judicial Workers' in the 2000 Census.").

[66] U.S. EQUAL EMP. OPP'Y COMM., DIVERSITY IN LAW FIRMS, (2003), *available at* http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf.

[67] *Id.*

[68] Drucilla Stender Ramey, *BASF Diversity Initiatives in 2000*, 26 S.F. ATT'Y 16 (2000).

[69] *See* James W. Pearce, JoAnn S. Hickey & Debra D. Burke, *African Americans in Large Law Firms: The Possible Cost of Exclusion*, 42 HOW. L.J. 59, 60 (1998) (finding that the 1990 census states that "white males comprised 92.5 percent of the legal profession, while only 3.3 percent of the nation's lawyers were African Americans").

[70] Lindgren, *supra* note 48.

from associate positions to obtain lucrative partnership positions. The National Association for Law Placement (NALP) reports that in 2009, of the approximately 1,500 law offices and firms reporting, African American males represent 1.8% of associate positions and 1.2% of partners in major law firms.[71]

Minority males who gain access to positions in major law firms leave those positions in a shorter period of time than similarly situated white males. The NALP also reports that—compared to 21.6% of all men—29.6% of minority male associates departed their employment within 28 months; 68% of minority men departed within 55 months of their start date as opposed to 52.3% of men overall.[72]

E. Few Opportunities as Judicial Law Clerks

From 1992 to 2000, the numbers of African American male judicial clerks remained relatively low in both federal and state courts.[73] From 1993 to 2007, no more than 6.6% of judicial clerks reporting to NALP were African American.[74] Moreover, from 1992-2009, the number of African American males who served as judicial clerks ranged from a 2009 low of 1% to 2.1% of all clerks.[75]

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[71] *Women and Minorities in Law Firms By Race and Ethnicity*, NALP BULL., Jan. 2009, *available at* www.NALP.org/race_ethn_jan2010

[72] U.S. EQUAL EMP. OPP'Y COMM., *supra* note 66, at 4 (citing NALP FOUND. FOR LAW CAREER RESEARCH AND EDUC., KEEPING THE KEEPERS II: MOBILITY AND MANAGEMENT OF ASSOCIATES 21-23 (2003)).

[73] This section focuses primarily on employment of African American males in federal courts and the U.S. Supreme Court. State courts also lack diversity among their judicial clerks. For example, during 1998 and 2004, white males and white females represented more than 85% of the clerks in Florida's state courts; whereas, African American males represented 1.2% in 1998 and 0.3% in 2004. STANDING COMM. ON FAIRNESS AND DIVERSITY, PROMOTING AND ENSURING THE DIVERSITY OF JUDICIAL STAFF ATTORNEYS AND LAW CLERKS WITHIN THE FLORIDA STATE COURTS SYSTEM 39 (2005), *available at* www.flcourts.org/gen_public/family/diversity/bin/lawclerk_report.pdf. *See also* Dana E. Sullivan, *Justices Pitch for Minority Clerks; Hire Few Themselves*, 16 N.J. LAW. 1 (Oct. 22, 2009) (finding that "[a]t the highest level of the New Jersey Court system, there's not a single black or Hispanic male among 22 clerks serving the seven justices of the Supreme Court").

[74] *A Demographic Profile of Judicial Clerks*, NALP BULL., June 2008 (finding that at all levels of clerkship, between five and eight percent of clerks are "Minority Men"), *available at* http://nalp.org/jun2008demographicprofile; Special Committee on Race and Ethnicity, *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 236-38 (describing the selection process of judicial clerks); *A Demographic Profile of Judicial Clerks*, NALP BULL., July 2003 (revealing that no more than 6.5% of all clerks were African American; however, the data is not broken down into African American women and African American men.).

Few African American male law graduates have clerked for judges according to a recent study,[76] and the resulting disconnect diminishes the opportunity for African Americans to exert unspoken influence on judicial decision-making.[77] Judicial clerkships in state and federal courts and with the U.S. Supreme Court are some of the most prestigious positions in the legal profession. Often, employers recruit former judicial clerks for positions as law professors, associates in major law firms, and judicial appointees.[78] When selecting judicial clerks, judges often consider whether the applicant served on law review, the reputation of the law school the applicant attended, and the applicant's personality.[79] Consideration of these factors may have a disparate impact on African American male graduates.[80] In 2002, the federal courts developed a hiring plan for applicants to follow in applying for a federal judicial clerkship.[81] There is little evidence that the court's hiring procedure has resulted in an increase in the number of African Americans hired as judicial clerks.

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[75] Judith N. Collins, *A Demographic Profile of Judicial Clerks—Patterns of Disproportionality*, NALP BULL. (forthcoming Nov. 2010); Letter from Shawn Beem, Director, NALP, and Associate Director, Office of Professional Development, Capital University Law School, to Floyd Weatherspoon, Professor, Captial University Law School (July 7, 2009) (on file with author) (forwarding historical survey data provided by Judith N. Collins).

[76] Letter from Shawn Beem, *supra* note 75.

[77] Todd C. Peppers, Michael W. Giles, & Bridget Tainer-Parkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 636 (2008) (discussing the mentoring and close bonding between judges and their clerks) (citing TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006)); *see also* MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-53 260 (1997) (describing Justice Frankfurter's selection of William Coleman as the first African American to clerk for the United States Supreme Court).

[78] *See* STANDING COMM. ON FAIRNESS AND DIVERSITY, *supra* note 73, at 36. Former President of the ABA, William G. Paul's statement: "Judicial law clerks become leaders in the profession, become judges and partners in law firms. They are very visible in the justice system and are role models for law students. Having minority clerks provides judges with more diverse views about the law and about the effects of judicial decisions." *Id.*

[79] Peppers, *supra* note 77, at 639 (explaining that a survey of federal judges revealed the factors they consider in selecting a clerk).

[80] *Id.* at 623. (stating that law clerk hiring practices are riddled with allegations of gender and racial bias).

In the 1990s, the issue of lack of diversity among the U.S Supreme Court's law clerks received national attention.[82] A little over a decade later, there has only been a marginal improvement in the hiring of African American judicial clerks.[83] The U.S. Supreme Court employs approximately eighteen law clerks each year. The pipelines for African American law graduates rarely lead to these types of positions.[84] White male law graduates are primarily groomed and selected for these positions.[85] Since 1998 between zero and nine minority clerks served in any given year, and in 2009, Justice Thomas indicated that African Americans and Hispanics are the two most difficult minority groups to retain as clerks.[86]

F. Few African American Male Law Professors

The American Association of Law Schools (AALS) reported that during the 2007-2008 school year, only 348 of 10,780 professors were African American males.[87] Moreover, the number of African American males listed on the AALS register of applicants to be considered for a professor position was only 35 or 6.2% of all the applicants.[88] These numbers reveal that very few African American male lawyers are considered or selected into this exclusive club of law professors.

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[81] U.S. CT. OF APPEALS, D.C. CIRCUIT FEDERAL JUDGES LAW CLERK HIRING PLAN (2010), *available at* http://www.cadc.uscourts.gov/internet/lawclerk.nsf/Content/SUMMARY?OpenDocument. The hiring plan has not been without controversy. *See generally* Mark W. Pletcher & Ludovic C. Ghesquiere, *In Restraint of Trade: The Judicial Law Clerk Hiring Plan*, 78 U. COLO. L. REV. 147 (2007).

[82] Tony Mauro, *Only 1 New High Court Clerk is a Minority*, USA TODAY, Sep. 10, 1998, at 9A; Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY, Mar. 13, 1998, at 12A.

[83] NALP, COURTING CLERKSHIP: THE NALP JUDICIAL CLERKSHIP STUDY (2000), *available at* http://www.nalp.org/courtingclerkships (indicating that minorities still remain underrepresented as judicial clerks).

[84] Tony Mauro, *Thomas Said To Be Frustrated by Lack of Minority Clerks*, USA TODAY, Aug. 5, 1998, at 1A.

[85] Tony Mauro, *Clerk Tally*, LEGAL TIMES, Nov. 15, 2004, at 12, *available at* http://www.judicialclerkships.com/TonyMauroArticle.htm; Laura Gatland, *A Clerkship for White Males Only?*, 28 STUDENT LAW. 34 (1999).

[86] Tony Mauro, *Thomas and Breyer Discuss Supreme Court Clerk Diversity at Budget Hearing*, LEGAL TIMES, Apr. 28, 2009, *available at* http://www.law.com/jsp/article.jsp?id=1202430233762.=.

[87] PATI ABDULLINA, ASS'N OF AM. LAW SCHOOLS, 2007-2008 AALS STATISTICAL REPORT ON LAW FACULTY (2008), http://aals.org.cnchost.com/statistics/2008dlt/race.html (showing that as of 2007-2008 school year, only 348 out of 10,780 faculty members (or

The pipeline to the position of law professor normally flows from an Ivy League law school through a position as an associate at a major law firm or as a judicial clerk, or both.[89] Since large law firms and courts employ few African American males, the current legal employment market diminishes the opportunity for African American male attorneys to be hired as full time tenured professors.

African American men hired as law professors face challenges with retention, promotion, and tenure. A study of newly hired law professors during the 1990-1991 school year tracked their status seven years later, revealing that schools more often than not retained, promoted, and offered tenure to fewer African American male law professors than to other groups.[90] The study shows the extreme difficulty confronted by African American males who seek to obtain and maintain tenure track law professor positions.

III. WHY ARE AFRICAN AMERICAN MALES UNDER-REPRESENTED IN THE LEGAL PROFESSION?

A. The Failure of the Public Education System to Educate African American Males

The educational pipelines that flow from elementary school through professional school contain insurmountable barriers and obstacles for African American males. Numerous fac-

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3.6%) who disclosed their race were African American Males (less the 1,121 respondents who did not identify a race)).

[88] *Id.* at 3 (listing individuals interested in being considered for a law professor position at an AALS member school or fee paying law school).

[89] Lucinda Jesson, *So You Want To Be a Law Professor*, 59 J. LEGAL EDUC. 450, 450-53 (2010).

[90] RICHARD A. WHITE, THE PROMOTION, RETENTION, AND TENURING OF LAW SCHOOL FACULTY: COMPARING FACULTY HIRED IN 1990 AND 1991 TO FACULTY HIRED IN 1996 AND 1997, at 8–11 (2004), *available at* http://aals.org.cnchost.com/documents/2005recruitmentreport.pdf.

tors disrupt the educational pipelines in elementary school for far too many African American males.[91] At this early age, negative educational experiences suppress their interest in school and their desire to excel academically. Beginning in elementary school,[92] educators often disproportionately place African American males in special education programs.

Middle schools and high schools disproportionately suspend and expel African American males[93] and refer them to the juvenile justice system. Once in the juvenile justice systems, the pipelines to college are permanently derailed. For example, African American males who fail to complete high school are "3.1 times more likely than high school graduates to become incarcerated and 7.8 times more likely than college graduates."[94]

African American males are disproportionately suspended and expelled from school and placed in special education classes.[95] They are absent in pre-college and advanced classes.[96] Their grade point averages are lower than white students',[97] and they score lower on educational achievement tests.[98]

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[91] Lionel Brown, *America's Black Male: Disadvantaged from Birth to Death*, 3 PENN GSE PERSP. URB. EDUC. 1, 3–5 (2004), *available at* http://www.urbanedjournal.org/notes/notes0016.pdf.

[92] *Id.* at 4 (citing studies that indicate that black boys face negative experiences in public schools starting in third grade); *see also* JAWANZA KUNJUFU, COUNTERING THE CONSPIRACY TO DESTROY BLACK BOYS, VOLUME II (1986).

[93] Melissa Roderick, *What's Happening to the Boys? Early High School Experiences and School Outcomes Among African American Male Adolescents in Chicago*, 38 URB. EDUC. 538 (2003), *available at* http://uex.sagepub.com/cgi/reprint/38/5/538.

[94] *See The Pipeline Crisis: Winning Strategies for Young Black Men*, NERA ECON. CONSULTING (Nat'l Econ. Research Assoc., Washington, D.C), July 14, 2006, at 34.

[95] SCHOTT FOUND. FOR PUB. ED., PUBLIC EDUCATION AND BLACK MALE STUDENTS: THE 2006 STATE REPORT CARD 12 (2006), *available at* http://www.schottfoundation.org/publications/Schott_06_report_final.pdf [hereinafter SCHOTT]. In some states the disparity is startling. For example, in Florida the suspension and expulsion rates for African American males are 29%. *Id.* at 25. They are classified in the mental retardation category at 28%. *Id.* The overall enrollment for African American males was 12%. *Id.* Similarly, in Georgia the enrollment rate for African American males was 19.75%, but their suspensions and expulsion rates were 41.89% and 45.09%, respectively. *Id.* at 31. They were classified in the mental retardation category at a rate of 36.92%. *Id.*

[96] COLLEGEBOARD AP, THE 5TH ANNUAL AP REPORT TO THE NATION 2 (2009) (reporting that although there are a number of African American students participating in AP, they are still underrepresented: "Black or African American students represent 14.4 percent of the public school graduating class of 2008 and 7.8 percent of the AP examinee population"). *But see* DAVID WAKELYN, NAT'L GOVERNOR ASS'N CTR. FOR BEST PRAC., RAISING RIGOR, GETTING RESULTS: LESSONS LEARNED FROM AP EXPAN-

Numerous sources study and report the under-class status of African American males in public schools, yet significant institutional improvement remains notoriously absent.[99] The studies suggest that a number of life and social factors impact educationally successful African American males.[100] There have been isolated and sporadic successes from a few school districts.[101] Often, many other African American males will succumb to these pressures and will take a permanent detour from all educational systems. Many school districts have failed to develop a comprehensive plan to motivate and encourage African American males to remain and excel in school.[102]

African American males drop out of school at a higher rate than any other group.[103] Some school districts report that the

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SION 3 (2009) (reporting that only 3.5% of the mastery level scores on the AP exam are made by African American students, who make up 14% of high school AP students). Participation in AP gives high school students an opportunity to study at the college level. *Id.*

[97] NAT'L CTR. FOR EDUC. STAT., U.S. DEPT. OF EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS 2005 HIGH SCHOOL TRANSCRIPT STUDY: GRADE POINT AVERAGE, TOTAL GPA (2005) *available at* http://nationsreportcard.gov/hsts_2005/hs_gpa_3a_1.asp?tab_id=tab3&subtab_id=Tab_1#chart (GPAs not by gender; in 2005 African American students' average GPA was 2.69, and White students' was 3.05).

[98] *See* THE BLACK-WHITE TEST SCORE GAP 1 (Christopher Jencks & Meredith Phillips eds., 1998).

[99] Will J. Jordan & Robert Cooper, *High School Reform and Black Male Students: Limits and Possibilities of Policy and Practice*, 38 URB. EDUC. 196 (2003), http://uex.sagepub.com/cgi/reprint/38/2/196.

[100] IVORY A. TOLDSON, BREAKING BARRIERS: PLOTTING THE PATH TO ACADEMIC SUCCESS FOR SCHOOL-AGE AFRICAN-AMERICAN MALES 31-37 (2008).

[101] SCHOTT, *supra* note 95, at ii; Gail L. Thompson, *Improving the Schooling Experiences of African American Students: What Leaders and Teachers Can Do*, *in* NARROWING THE ACHIEVEMENT GAP: STRATEGIES FOR EDUCATING LATINO, BLACK, AND ASIAN STUDENTS 153-55 (Susan J. Paik & Herbert J. Walberg eds., 2007).

[102] *See* Press Release, Schott Foundation for Public Education, New Report "Yes We Can" Shows America's Public Schools Fail Over Half the Nation's Black Male Students (Aug. 17, 2010) (on file with author); Michael Cottman, *Educators: System Sets Up Black Boys to Fail*, NEW AMERICA MEDIA (Sept. 03, 2010), http://newamericamedia.org/2010/09/educators-system-sets-up-black-boys-to-fail.php.

[103] James M. McPartland & Will J. Jordan, *Essential Components of High School Dropout-Prevention Reforms*, *in* DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS 269 (Gary Orfield ed., 2004); Gary Orfield, *Losing Our Future: Minority Youth Left Out*, *in* DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS 1 (Gary Orfield ed., 2004); Hillard Pouncy, *Toward a Fruitful Policy Discourse*

dropout rate exceeds 50%.[104] This also negatively impacts their graduation rates. The national graduation rate for African American males during the 2003-2004 school year was 45%.[105] Indeed, many of the country's largest school districts report that the graduation rate for African Americans is below 50%.[106] The U.S. Census Bureau also reports that only 12% of white males twenty-five and over earned less than a high school education compared to 22% of African American males.[107]

Reading is the foundation for academic achievement. Reading skills are at the basic core of the pipelines that lead to college and to law school. Consequently, the legal profession requires a high level of reading comprehension. However, African American males test disproportionately below the national reading standard. For example, the National Assessment of Educational Progress reported that in 2007, African American males taking the eighth grade reading assessment averaged a score of 238 while white males averaged 267; African American males scored lower than all other racial groups.[108] Additionally, the College Board reported that in 2009 African American male high school seniors achieved a mean score of 426 in critical

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about Less-Educated Young Men, *in* BLACK MALES LEFT BEHIND 293, 296 (Robert Mincy ed., 2006).

[104] *But see* LAWRENCE MISHEL & JOYDEEP ROY, RETHINKING HIGH SCHOOL GRADUATION RATES AND TRENDS 3-4, 19, 21-22 (2006) (using "National Education Longitudinal Study" data—"the very best data"—dispels the notion of a 50/50 chance of high school graduation, revealing that dropout rates for African Americans are actually around 25%, versus 17-20% for whites, and explaining why Professor Swanson of the Urban Institute miscalculates the dropout rate by failing to account for students held back in the ninth grade that go on to graduate later—effectively counting them as "dropouts" instead of "dropins"); SCHOTT, *supra* note 95, at 1.

[105] SCHOTT, *supra* note 95, at 1-2, 9.

[106] SCHOTT FOUND. FOR PUB. EDUC., GIVEN HALF A CHANCE: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 15 (2008), http://www.blackboysreport.org/files/schott50statereport-execsummary.pdf (citing the graduation rate for African American males in Detroit as 20%, Memphis City as 35%, Broward County (FL) as 38%, and Los Angeles as 41%).

[107] U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT BY RACE, HISPANIC ORIGIN, AND SEX: 1970 TO 2008 (2010), http://www.census.gov/compendia/statab/2010/tables/10s0225.pdf.

[108] J. LEE, W. GRIGG & P. DONAHUE, NAT'L CTR. FOR EDUC. STATISTICS, NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4 AND 8, at 28-29 (2007), *available at* http://nces.ed.gov/nationsreportcard/pdf/main2007/2007496.pdf.

reading while white males scored a mean of 530.[109] These scores are used by colleges and universities to evaluate a student's application for admission.

The deplorable status of African American males in public schools[110] directly correlates to their admission and success in college and ultimately law school. Unless there are dramatic institutional changes in public school systems, unresolved problems will clog the legal education pipelines and inhibit the growth and development of African Americans who aspire to enter the legal profession.

B. The Mass Incarceration of Young African American Males

There are more African American males in jail and prison than in college.[111] The U.S. Justice Department reports that in 2005 approximately 8% of African American males in their late twenties were in prison.[112] Federal and state jails and prisons currently hold more than 500,000 African American males.[113] The U.S. Justice Department projects 32% of African American males born in 2001 will serve some time in prison during their lifetime.[114] A study by the PEW Center reports that "[w]hile one in 30 men between the ages of 20 and 34 is behind bars, for black males in that age group the figure is one in nine." [115]

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[109] *See also* Antoine M. Garibaldi, *The Educational Status of African American Males in the 21st Century*, 76 J. NEGRO EDUC. 324 (2007) (citing a number of statistics on the educational status of African American males), *available at* http://findarticles.com/p/articles/mi_qa3626/is_200707/ai_n21280207/; THE COLL. BD., TOTAL GROUP PROFILE REPORT 3 (2009), *available at* http://professionals.collegeboard.com/profdownload/cbs-2009-national-TOTAL-GROUP.pdf.

[110] *See* Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L.J. 1, 4 (2006).

[111] VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INST., CELLBLOCKS OR CLASSROOMS? THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN 9-10 (2002), http://www.justicepolicy.org/images/upload/02-09_REP_CellblocksClassrooms_BB-AC.pdf. There is some dispute among researchers whether this often cited statement is correct. *Id.* at 15.

[112] PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUST. STATS., PRISONERS IN 2005, at 1 (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/p05.pdf.

[113] *Id.* at 8.

[114] THOMAS P. BONCZAR, BUREAU OF JUST. STATS., PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf.

What a waste of talent! These statistics show the collateral effect that mass incarceration has on African American males. How ironic that America incarcerates enough individuals to be ranked near the top in that category.[116] The mass incarceration of African American males is similar to the mass number of African American males enslaved during the height of slavery.[117] The National Center for Education Statistics reports that approximately 1,000 African American males and 18,000 white males graduated from law school during the 2005-2006 school year.[118] Individuals who could have pursued legal careers and graduated from law schools instead look out from behind bars because they are among the 500,000 incarcerated African American males.

Once released from prison or jail, African American males face a number of hurdles if they choose to return to the educational pipelines. Often they leave the correctional system with major educational deficiencies and no high school diploma or General Education Diploma (GED).[119] Moreover, they lack skills to find meaningful employment while pursuing their GED or a college degree.[120]

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[115] JENIFER WARREN ET AL., THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 3 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

[116] *See* MARC MAUER, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS (2003), *available at* http://www.sentencingproject.org/doc/publications/inc_comparative_intl.pdf.

[117] Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599, 600 (2007).

[118] Institute of Education Sciences: National Center for Education Statistics, *Table 284: First-Professional Degrees Conferred By Degree-Granting Institutions, by Sex, Race/Ethnicity, and Major Field of Study: 2005-06*, *in* DIGEST OF EDUCATION STATISTICS (2007), *available at* http://nces.ed.gov/progra ms/digest/d07/tables/dt07_284.asp.

[119] Harriet R. Morrison & Beverly D. Epps, *Warehousing or Rehabilitation? Public Schooling in the Juvenile Justice System*, 71 J. NEGRO EDUC. 218 (2002).

[120] Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, *in* CRITICAL ISSUES IN CRIME AND JUSTICE 408, 411 (Albert R. Roberts ed., 2d ed. 2006) ("[A]s many as 60 percent of former inmates are not employed in the legitimate labor market."); Michael D. Reisig, William D. Bales, Carter Hay & Xia Wang, *The Effect of Racial Inequality on Black Male Recidivism*, 24 JUST. Q. 408, 409, 412-13 (2007).

Normally, they leave prison with a felony on their record that limits their employability.[121] If they were convicted of a drug offense, they may be denied federal grants or loans to attend college.[122] The combination of education deficiencies, restricted educational funds, criminal records, and a lack of employment opportunities permanently "disconnects" African American males from the pipelines to college and law school.[123]

C. Low College Enrollment and Graduations Rates For African American Males

Numerous sources show the dearth of African American males seeking a college education. In 2000, 62% of African American females enrolled in colleges and universities, while only 37% of African American males followed suit.[124] The number of bachelor's degrees awarded to African American students continues to increase, but at a snail's pace. The U.S. Census Bureau reports that from 1990 to 2006, the percentage of African Americans receiving bachelor's degrees increased from 5.8% to 9.6%.[125] However, the U.S. Census also reports that only 16% of African American males over twenty-five years old have a bachelor's degree.[126] In some urban areas where there is a higher population of African American males, even fewer have a high school diploma, resulting in an even further reduction in the percentage of those going on to college to obtain a bachelor's degree.[127]

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[121] ANDREW SUM, ISHWAR KHATIWADA, JOSEPH MCLAUGHLIN & PAULO TOBAR, CTR. FOR LABOR MKT. STUD., THE EDUCATIONAL ATTAINMENT OF THE NATION'S YOUNG BLACK MEN AND THEIR RECENT LABOR MARKET EXPERIENCES: WHAT CAN BE DONE TO IMPROVE THEIR FUTURE LABOR MARKET AND EDUCATIONAL PROSPECTS? 18, 20-21 (2007), http://www.clms.neu.edu/publication/documents/Ed_Attainment_of_Black_Males.pdf.

[122] Higher Education Act of 1998, Pub. L. No. 105-244, § 483, 112 Stat. 1581, 1736 (amended 2006).

[123] Harry J. Holzer, *Reconnecting Young Black Men: What Policies Would Help?, in* THE STATE OF BLACK AMERICA 75 (2007).

[124] U.S. CENSUS BUREAU, ATTENDANCE STATUS OF COLLEGE STUDENTS 15 YEARS OLD AND OVER, BY AGE, SEX, YEAR AND TYPE OF COLLEGE, RACE, AND HISPANIC ORIGIN: OCTOBER 2000 (2001), http://www.census.gov/population/www/socdemo/school/ppl-148.html.

[125] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009, Table 289 (2009), http://www.census.gov/compendia/statab/2009/tables/09s0289.pdf.

[126] JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002, at 4 (2003), *available at* http://www.census.gov/prod/2003pubs/p20-541.pdf.

According to the American Council on Education, in 2003 more than one million African American women were enrolled in college; whereas, approximately 700,000 African American males were in college.[128] Even at historically black colleges, African American women are enrolled in substantially higher numbers than African American males.[129] Similarly, African American women significantly outnumbered African American men in attendance at the nation's thirty highest ranking colleges and universities.[130] At some of the schools, African American women represented more than 60% of the black students. The study also stated:

> [B]lack women hold a large lead over black men in almost every facet of higher education. Black women currently earn about two thirds of all African-American bachelor's degree awards, 70 percent of all master's degrees, and more than 60 percent of all doctorates. Black women also hold a majority of all African American enrollments in law, medical, and dental schools.[131]

The pipelines to and from college continue to narrow considerably for African American male students. There are a number of barriers that African American males face in attending college. Among those barriers include a lack of motivation to attend college and an understanding of the value of obtaining a college education.[132] A lack of mentors, parental support, and financial resources also contribute to the relatively low enrollment of African American males in college.[133] Unless the number of African American males enrolled in college increases substantially, the number of African American males attending law school will likely decline or remain stagnant.

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[127] RANDELL MCSHEPARD, TIM D. GOLER & MARK C. BATSON, POLICYBRIDGE, UNTAPPED POTENTIAL: AFRICAN-AMERICAN MALES IN NORTHEAST OHIO 5, 6 (2005), *available at* http://www.policy-bridge.org/ResearchReports/Untapped_Potential.pdf (describing the "dismal statistics on educational attainment among African American men in Northeast Ohio").

[128] AM. EDUC. COUNCIL, MINORITIES IN HIGHER EDUCATION ANNUAL STATUS REPORT, 2006, at 44 (2006); Garibaldi, *supra* note 109, at 329.

[129] Garibaldi, *supra* note 109, at 329-30.

[130] *Black Women Students Far Outnumber Black Men at the Nation's Highest-Ranked Universities,* J. BLACKS HIGHER EDUC., Spring 2006, at 26, 26-28.

[131] *Id.* at 26.

[132] Ivory A. Toldson, Ronald L. Braithwaite & Rashika J. Rentie, *Promoting College Aspirations Among School-Age Black American Males, in* DIVERSITY IN HIGHER EDUCATION 117, 117-37 (Henry T. Frierson, James H. Wyche & Willie Pearson, Jr. eds., 2009).

D. Admission Into Law School: Declining Number of African American Males

The enrollment of African American students in law schools has been stagnant with only marginal increases during the past fifteen years.[134] The number of African American applicants to law school declined for three consecutive years: 2005, 2006, and 2007.[135] In 2006, there was a major drop of African American applicants to law school: 6.6%.[136] American law schools typically admit around 3,500 African Americans to law school every year or 7.25% of all first-year J.D. students.[137] Regarding the total number of students enrolled, during the 2008-2009 school year, there was a modest increase in African American students, from 9,483 to 9,822.[138] And between 1993 and 2010, LSAC reported that the number of African Americans enrolled in law school oscillated from 9,100 to 10,100 each academic year.[139]

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[133] *See* BLACK AMERICAN MALES IN HIGHER EDUCATION: DIMINISHING PROPORTIONS (Henry T. Frierson, James H. Wyche & Willie Pearson, Jr. eds., 2009) (containing a collection of articles on the barriers African American males face in attending college); JACKSON CMTY. COLL., AFRICAN-AMERICAN MALE SUMMIT EXECUTIVE REPORT 63-66 (2008), *available at* http://www.jccmi.edu/diversity/docs/SummitReport.pdf.

[134] AM. BAR ASS'N, AFRICAN AMERICAN J.D. ENROLLMENT, 1971-2007 (2007), http://www.abanet.org/legaled/statistics/charts/stats%20-%2013.pdf; Corbett, *supra* note 15 (discussing the challenges African American students face in gaining admission to law school).

[135] LAW SCH. ADMISSION COUNCIL, VOLUME SUMMARY APPLICANTS BY ETHNIC & GENDER GROUP (2009), http://www.lsac.org/lsacresources/data/PDFs/EthGenApps.pdf.

[136] *Id.*

[137] AM. BAR ASS'N, *supra* note 134; AM. BAR ASS'N, FIRST YEAR J.D. AND TOTAL J.D. MINORITY ENROLLMENT (2009), http://www.abanet.org/legaled/statistics/charts/stats%20-%208.pdf (reporting that during the 2008-2009 school year, 3,586 first-year African American students enrolled in law schools, or 7.25% of total first year enrollment).

[138] AM. BAR ASS'N, *supra* note 134 (reflecting the number of African American students enrolled for all four years).

[139] LAW SCH. ADMISSION COUNCIL, AFRICAN AMERICAN ENROLLMENT (2010), http://www.lsac.org/JD/pdfs/AfricanAmericanEnrollment.pdf. *But see* PHIL HANDWERK, LAW SCH. ADMISSION COUNCIL, VOLUME SUMMARY - ADDITIONAL INFORMATION (2000),

The enrollment of African American students recently declined at a number of highly ranked law schools [140] The admission pipelines to historically black law schools may also be diminishing. This occurred in part because an increasing number of white students denied admission to traditionally white law schools gained admission to historically black law schools.[141] The influx of white students at historically black law schools may adversely impact the admission of African American males at those institutions.[142] Interestingly, states established some black law schools to maintain segregation between the races, but now these laws schools are considerably more integrated than white law schools.[143] The once permanent pipeline of African American males from black law schools to the legal profession continues to vanish. African American males may be negatively impacted as the mission, role, and the make-up of the student body at historically black law schools continues to change.[144]

Fewer African American males enroll in law school compared to African American females. For example, a survey of African American students at Harvard Law School reports that between 66% and 70% of black students are women.[145] Other

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http://www.lsac.org/LSACResources/Data/PDFs/additional-info-volume-summary.pdf (noting that data-collection methodology changed in 2000 and warning that there is "no way" to compare post-2000 data to pre-2000 data).

[140] *The Decline in Black Enrollments at the Nation's Highest-Ranked Law Schools,* J. BLACKS HIGHER EDUC., Autumn 2007, at 8, 8-9, *available at* http://www.jbhe.com/news_views/57_black_enrolls_lawschools.html.

[141] Scott Dyer, *Southern Law Center's Increasing White Enrollment Concerns Lawmaker*, BLACK ISSUES, June 19, 2003, *available at* http://diverseeducation.com/article/3017/1.php.

[142] *The Law Schools at HBCUs Are Frequently the Only Educational Alternative for Aspiring Black Lawyers*, J. BLACKS HIGHER EDUC., Summer 2006, at 33 (listing six HBCUs: Florida A&M, NC Central, Howard, Southern Univ., Texas Southern Univ., and District of Columbia).

[143] Dyer, *supra* note 141; Vernellia Randall, THE 2004 WHITEST LAW SCHOOLS REPORT: THE TOP TEN WHITEST LAW SCHOOLS IN THE UNITED STATES (2010), *available at* http://academic.udayton.edu/Race/03justice/Legal Ed/Whitest/HWLS0403.htm.

[144] Kay, *supra* note 34, at 46, 67.

[145] Alexandra D. Hoffer, *Most HLS Black Students Female*, HARVARD CRIMSON Dec. 3, 2003, *available at* http://www.thecrimson.com/article/2003/12/3/most-hls-black-students-female-black/.

elite law schools enroll a similarly small amount of African American males.[146]

Historically, the admission process used by law schools adversely affected the number of African American students admitted to law school, while consideration of affirmative action factors drove the modest increase in racial diversity.[147] During the 1980s, law schools implemented affirmative action programs to recruit and admit minority students. After a number of anti-state affirmative action propositions,[148] public criticisms,[149] court decisions,[150] and laws outlawing affirmative action, many law schools have retreated from, if not totally dismantled, their affirmative action programs. Not even the decision by the Supreme Court in *Grutter v. Bollinger* supporting the University of Michigan's claim that diversity in law schools constituted a compelling governmental interest rejuvenated affirmative action programs in law schools.[151]

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[146] The following numbers reflect the total number of African American males out of the total number of enrolled students: Univ. of Chicago 17/590 or 2.9%, Yale Univ. 17/613 or 2.8%, Stanford Univ. 25/557 or 4.5%, N.Y.U. 32/1427 or 2.2%, U.C. Berkley 20/892 or 2.2%, Univ. of Pa. 31/782 or 4.0%, Univ. of Mich. 24/1117 or 2.2%, Duke Univ. 26/661 or 3.9%, Northwestern Univ. 34/814 or 4.2%, Univ. of Va. 19/1122 or 1.7%, Cornell Univ. 11/622 or 1.8%, Georgetown Univ. 54/1982 or 2.7%, U.C.L.A. 24/1011 or 2.4%, Univ. of Tex.-Austin 29/1174 or 2.5%, Vanderbilt Univ. 16/595 or 2.7%. NALP Directory of Law Schools, http://www.nalplawschoolsonline.org/ndlsdir_search_quick.asp# (last visited Sept. 26, 2010).

[147] Kidder, *supra* note 29, at 7; *see also* Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649, 652 (2008).

[148] Ellison S. Ward, *Toward Constitutional Minority Recruitment and Retention Programs: A Narrowly Tailored Approach*, 84 N.Y.U. L. REV. 609, 630-31 (2009) (surveying state initiatives against affirmative action).

[149] *See* Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 478-82 (2004); Iain Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); Jimmy Chan & Erik Eyster, *The Distributional Consequences of Diversity-Enhancing University Admissions Rules*, 25 J.L. ECON. & ORG. 499, 512 (2009).

[150] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Gratz v. Bollinger, 539 U.S. 244 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).

[151] *See* Leslie Yalof Garfield, *The Cost of Good Intentions: Why the Supreme Court's Decision Upholding Affirmative Admission Programs is Detrimental to the Cause*, 27 PACE L. REV. 15, 16-18 (2006) (suggesting that the administrative burden of compliance

The ranking of law schools by *U.S. News & World Report* magazine has resulted in many law schools giving greater consideration to standardized test scores.[152] An official from LSAC, which administers the test, stated that, "[c]olleges overemphasize test scores in admissions decisions because they can easily be quantified, and because higher LSAT scores make schools look better to those who try to rank America's law schools, like *U.S. News & World Report* magazine."[153] The higher the LSAT scores, the higher the ranking for the law school.[154] The increased reliance on the LSAT to the detriment of other factors further lessens the opportunity for African American males to be admitted into law school. There is also criticism that the misuse of the LSAT is racially biased toward minorities, but those criticisms tend to be ignored by many law

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with *Grutter* hinders affirmative action programs generally); WARD, *supra* note 148, at 612 n.18. In *Grutter*, the Supreme Court articulated a fine yet crucial distinction between racial balancing and the promotion of student-body diversity as an educational goal:

> As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

Grutter v. Bollinger, 539 U.S. 306, 329-30 (2003) (citations omitted). *But see* Dobbs, *supra* note 39.

[152] *See* John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167, 175 (2006) ("[T]here appears to be a widely-shared consensus that the influence of *U.S. News & World Report* rankings is pushing schools to increase their LSAT scores to enhance their competitive standing."); Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107 (2006).

[153] Joshua Benton, *Attracting Minorities a Priority at UT Law; Aggressive Recruiting Keeps Admissions Stable*, TOLEDO BLADE, Aug. 3, 1997, at F1, *available at* http://www.clipfile.org/1997/08/03/17; *see also* Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of* U.S. News & World Report *Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC'Y REV. 105 (2006).

[154] *See* Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593 (2001).

schools.[155] One or more of these practices by law schools, though facially neutral, may negatively impact an individual's law school admission.[156]

African American applicants to law school tend to have lower LSAT scores[157] and grade point averages than white applicants. The average LSAT score for African American students is 142, whereas the average score for white students is 152.[158] The mean LSAT score for African American males "remained relatively constant" at 142 during the years 1995-2002.[159] Lack of preparation and test anxiety, among other factors, may cause minorities to have low scores.[160] Lower grade point averages between African American students and white students may also impact LSAT scores. The average grade point average (GPA) for African American students is 2.74, whereas white students average 2.9.[161]

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[155] Randall, *supra* note 152, at 139 ("The misuse of the LSAT is not just an example of institutional racism; it is also an example of systemic racism, because law schools, the ABA, and the American Association of Law Schools ('AALS') are complicit in the misuse of the LSAT."); *The Widening Racial Scoring Gap on Standardized Tests for Admission to Graduate School*, J. BLACKS HIGHER EDUC., Spring 2006, at 8, 10, *available at* http://www.jbhe.com/news_views/51_graduate_admissions_test.html.

[156] *See* Nussbaumer, *supra* note 152, at 175 (indicating that admission practices may have a disparate impact on the admission of minorities). The disparate impact theory has been applied successfully in employment discrimination cases. Griggs v. Duke Power Co., 401 U.S. 424, 431, 436 (1971). In the context of Title VI litigation involving disparate impact, the Supreme Court limited a plaintiff's ability to bring such actions. *See* Alexander v. Sandoval, 532 U.S. 275 (2001). Recently, the Supreme Court further limited the application of the disparate impact theory. *See* Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

[157] Historically, African American students have consistently performed below other groups. *See* LINDA F. WIGHTMAN & DAVID G. MULLER, LAW SCH. ADMISSION COUNCIL, COMPARISON OF LSAT PERFORMANCE AMONG SELECTED SUBGROUPS 1 (1990), *available at* http://eric.ed.gov:80/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED468753 (determining that African American "test takers show[ed] the poorest performance" on the September 1989 exam).

[158] SUSAN P. DALESSANDRO, LISA ANTHONY STILWELL & LYNDA M. REESE, LAW SCH. ADMISSION COUNCIL, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 1995-1996 THROUGH 2001-2002 TESTING YEARS 13 (2002), *available at* http://www.lsac.org/LsacResources/Research/TR/TR-02-01.pdf.

[159] *Id.* at 20.

[160] *Pursue a Career in Law*, *supra* note 45.

[161] The Nation's Report Card, Grade Point Average, by Race/Ethnicity: Various Years, 1990-2005, http://nationsreportcard.gov/hsts_2005/data_hs_gpa_3a_1c.asp (last visited Sept. 26, 2010).

Lower LSAT scores of African American males may also be caused in part by the failure of the public education system to provide educational resources and instructions on taking standardized exams. If the public education system disproportionately excludes African American males from advanced high school and college courses throughout their educational experience, they will be negatively impacted when faced with the grueling LSAT exam.

E. Completion of Law School: Lowering the Attrition Rates of African American Males

Admission into law school does not guarantee completion. The rigor of law school causes the attrition of law students, and some law schools weed out students during the first year based on the student's failure to maintain a certain GPA. Consequently, law schools may disproportionately dismiss African American students.[162]

To address the attrition problem generally, law schools now require or highly recommend that students participate in school-sponsored academic success programs to assist those who enter law school with slightly lower grade point averages or LSAT scores. The academic success program is designed to enhance the academic status of participants.[163] It has been determined that these programs have been successful in lowering the attrition rate of African American students, especially those who may have entered law school with a lower LSAT score than other students admitted.[164]

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[162] U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS 5 (2007), *available at* http://www.usccr.gov/pubs/AALSreport.pdf ("Researchers generally agree that there are significant racial disparities in law school academic performance, graduation rates, and bar passage rates."); *see also* U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS 24 (2007), *available at* http://www.usccr.gov/pubs/AALSreport.pdf ("As best as we can tell, today only about one-third of blacks starting law school will graduate, take the bar, and pass on their first attempt.").

[163] Louis N. Schulze, Jr., *Balancing Law Student Privacy Interests and Progressive Pedagogy: Dispelling the Myth that FERPA Prohibits Cutting Edge Academic Support Methodologies*, 19 WIDENER L.J. 215, 238-42 (2009).

[164] Laurel Currie Oates, *Leveling the Playing Field: Helping Students Succeed by Helping Them Learn to Read as Expert Lawyers*, 80 ST. JOHN'S L. REV. 227, 243, 251, 254-55 (2006); Leonard M. Baynes, Introduction, *The LSAT*, U.S. News & World Re-

Law students may also withdraw from law school because of a lack of financial aid, family obligations, and a feeling of isolation. If students feel isolated or labeled, they may drop out of law school.[165] The matriculation rate for African American students has been primarily stagnant. During 1998-1999, approximately 2,800 African American students graduated from law school, representing approximately 7% of the year's law school graduates.[166] When coupled with higher attrition rates, these numbers demonstrate the depth of the racial disparity in the legal education, one of the final steps on the pipeline.

F. The Bar Exam: The Last Step of the Pipelines to Enter the Legal Profession

After successful completion of law school, minority students face the daunting task of taking a state bar exam. Almost every state requires law students to pass a bar examination as the final step on the pipelines to the legal profession. Unfortunately, the final step can be the most challenging obstacle for African American law students to overcome.

Macon B. Allen, an African American male, became the first African American to pass a state bar exam in 1844.[167] More than 160 years later, African American law students continue to face major hurdles in passing state bar examinations. Today, a number of studies expose a substantial gap in the passage rate on state bar exams between white and African American bar testers.[168] A seminal LSAC study confirmed the

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port, *and Minority Admissions*, 80 ST. JOHN'S L. REV. 1, 11 (2006); *see also* Lorraine K. Bannai & Marie Eaton, *Fostering Diversity in the Legal Profession: A Model for Preparing Minority and Other Non-Traditional Students for Law School*, 31 U.S.F. L. REV. 821, 822 (1997) (mentioning academic support as a "laudable" method of increasing diversity in the legal profession).

[165] *See generally* Stephen R. Ripps, *A Curriculum Course Designed for Lowering the Attrition Rate for the Disadvantaged Law Student*, 29 HOW. L.J. 457 (1986).

[166] GITA Z. WILDER, LAW SCH. ADMISSION COUNCIL, THE ROAD TO LAW SCHOOL AND BEYOND: EXAMINING CHALLENGES TO RACIAL AND ETHNIC DIVERSITY IN THE LEGAL PROFESSION 23-24 (2003), *available at* http://www.lsac.org/LSACResources/Research/RR/RR-02-01.pdf.

[167] SMITH, *supra* note 15, at 93.

[168] LINDA F. WIGHTMAN, LAW SCH. ADMISSION COUNCIL, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 32 (1998), *available at* http://www.lsac.org/LSACResources/Research/RR/Wightman-LSAC-98.pdf (finding that 77.6% of blacks pass and 96.7% of

bar passage gap.[169] Few states publish bar passage rates for specific gender and racial groups, but where the data is collected the disparity is clear.[170]

Courts have explored whether the bar exam has any correlation to the practice of law and whether it has a discriminatory impact on African Americans.[171] Courts confronted these issues in the 1970s, and in *Richardson v. McFadden*[172] the court rejected the challenge and upheld the constitutionality of the bar exam as applied to African American applicants.[173] Also, in the 1970s, a number of states adopted a multistate bar examination to standardize the bar exam among the states.[174] Some thought that standardizing the test would reduce the disparity in the passage rate between African American and white bar exam takers. Thirty years later, the disparity still exists, even with the standardized multistate bar exam.[175] And recently a number of states increased the passing score for the exam, fur-

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whites pass). *See generally* Jane E. Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admissions to the Legal Profession*, 18 NAT'L BLACK L.J. 63 (2004).

[169] WIGHTMAN, *supra* note 168, at 32 (finding that 77.6% of blacks pass and 96.7% of whites pass); *see* Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, B. EXAMINER, Nov. 1997, at 8, *available at* http://www.ncbex.org/uploads/user_docrepos/660497_Klein_Bolus.pdf.

[170] For example, 53% of first-time African American takers passed the 2004 administration of the Texas bar exam compared to 85% of first-time white takers that passed the same exam. STEPHEN P. KLEIN & ROGER BOLUS, TEX. BD. OF LAW EXAM'RS, ANALYSIS OF JULY 2004 BAR EXAM RESULTS BY GENDER AND RACIAL/ETHNIC GROUP (2006), http://www.ble.state.tx.us/one/analysis_0704tbe.htm#q2. The report concluded that there was "no reason to make any changes in the nature of the exam itself. It appeared to be well balanced and fair to all takers." *Id.*

[171] *See* Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975); Pettit v. Gingerich, 427 F. Supp. 282 (D. Md. 1977); Harper v. D.C. Comm. on Admissions, 375 A.2d 25 (D.D.C. 1977).

[172] 540 F.2d 744, 748 (4th Cir. 1976).

[173] *See* Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721 (1996) (discussing judicial challenges to the bar exam).

[174] John Eckler, *The Multistate Bar Examination: Its Origins and Objectives*, B. EXAMINER, Feb. 1996, at 14, 16, 18, *available at* http://www.ncbex.org/uploads/user_docrepos/650196-_Eckler.pdf.

[175] *But see* Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 457-58 (2004) (concluding that the MBE neither increases nor decreases the disparate impact felt by minorities because the impact is more heavily correlated with other factors).

ther limiting the entrance of African Americans into the legal profession.[176]

Substantial literature has been written on how African Americans are disproportionately impacted by the bar exam, which delays their ability to practice law.[177] However, there has been little discourse on how to eliminate this disparity.[178] Consequently, passage of state bar exams still remains a barrier for a disproportionate number of African American law students to enter the legal profession.[179]

G. Discriminatory Hiring and Promotion Practices in Law Firms

Many articles address the lack of African American lawyers employed by law firms and working as partners.[180] The question often asked is: Why are African Americans absent from the halls of the elite law firms?[181] The question is quite easy to answer: Law firms engage in both intentional and unintentional discrimination. Major, elite law firms engage in the practice of hiring only African Americans who can assimilate into the traditional white male culture of the law firm.[182] African American males hired as associates by large law firms walk a thin line between maintaining their own culture and self-identity and assimilating into the firm's culture. They are judged based on their race and gender—being black and male.[183] For example, the black male associate must be physically fit but not too muscular, needs to have some connections to the black community but not too many, must have graduated from a top-tier law school or excelled at a lower tier law school, and must be acceptable to white clients.[184] Most of these considerations are based on stereotypical biases that violate federal discrimination laws.[185]

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[176] Mark H. Alcott, *President's Message: Closing Statement*, 79 N.Y. ST. B.A. J. 5, 49 (2007); Cross, *supra* note 168, at 82; Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 965 (2001).

[177] *See* Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005); Cross, *supra* note 168; Maurice Emsellem, *Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination*, 61 N.Y. ST. B.J. 42 (1989); Dannye Holley & Thomas Kleven, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299 (1987); Hunt, *supra* note 173.

[178] Merritt, *supra* note 176, at 966-67.

[179] For instance, the mean score of African American first-time takers for the New York Bar Exam was 670.83, while the mean score for white first-time takers was 720.43. ANDREW MROCH, MICHAEL KANE, DOUGLAS RIPKEY & SUSAN CASE, NAT'L CONF. OF BAR EXAM'RS, IMPACT OF THE INCREASE IN THE PASSING SCORE ON THE NEW YORK BAR EXAMINATION: FEBRUARY 2006 BAR ADMINISTRATION 46 (2007), http://www.nybarexam.org/press/nyrep_feb06.pdf. In Texas, all whites averaged 717.7 while all African Americans averaged 670.5 on the state bar examination. KLEIN, *supra* note 170.

[180] *See* Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829 (1995); Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005 (1997).

[181] *See generally* David B. Wilkins & G. Mitu Gulati, *Why Are There so Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996) (providing a comprehensive analysis of the status of African American lawyers in the elite law firms and why they leave).

Law firms speak loudly regarding their desire to have "diversity." Yet often diversity means hiring someone of a different color or gender whose values, norms, and culture match those of the firm.[186] Law firms also have neutral hiring and promotional practices that have a disparate impact on minorities.[187] Typically, the elite law firms hire new associates who attended the same law schools as the partners, graduated top of their class, were on the law review,[188] and served as federal judicial clerks.[189] These practices, though neutral on their face, operate to exclude African Americans from the high paying positions in major law firms. Law firms have not made any concerted efforts to consider other alternative selection devices to predict the performance of new hires.[190] Instead, they continue with the "hire someone like me" syndrome.

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[182] Mark A. Cunningham, *On Sports Law and Recruitment and Retention of Minority Lawyers*, 46 LA. B.J. 222, 226-27 (1998) (finding that white partners may "feel more comfortable giving substantive work to the young white associate, who . . . looks more like they do or came from a similar environment").

[183] Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L.J. 23, 25-26 (1996).

[184] *See id.* at 23.

[185] Price Waterhouse v. Hopkins, 409 U.S. 228, 241-42 (1989).

[186] *See generally* Richard Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1765-66, 1768 (2006) (discussing five potentially "causally intertwined" theories explaining why large firms persistently employ few minority associates).

[187] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[188] Few African American students are on the law review staff at law schools. Membership on the law review and serving as an editor further open the pipelines to positions at law firms. *See* Jia Cobb, Lauren Sudeall & Amanda Teo, *Diversity on the Law Review*, HARV. L. REC., May 2, 2005, *available at* http://www.hlrecord.org/2.4462/diversity-on-the-law-review-1.579277 (describing how few African Americans are on the law review at Harvard and other law schools).

The retention of African American associates continues to be a significant challenge for the major, elite law firm. A recent survey of associates revealed that 11.5% of African American associates actively sought employment while only 8.2% of white associates reported seeking employment.[191] The pipelines from associate to partner close abruptly as African American associates disproportionately leave the firm for other legal opportunities. "Virtually all the blacks who start at a given elite law firm leave before becoming partner."[192] A recent study indicates that more African Americans at larger law firms seek out other employment, worry about retention, and cite a dearth of work as the main reason for finding a position outside the firm.[193] The good news in this revolving door of African American associates in and out of elite law firms is that many will start their own private practice and thus create opportunities for other African American lawyers.[194] The pipelines to private practice may not lead to the financial benefits partners receive, but the ability to manage their firm, hire other African American lawyers, and support community programs may be a greater benefit than the pipeline to partnership.[195]

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[189] *See* Johnson, *supra* note 180, at 1013 (reaching a similar conclusion about "the subtle, discriminatory hiring practices").

[190] *Griggs*, 401 U.S. at 436.

[191] Susan Hansen, *Diversity's Bottom Line: Why African American Midlevels Worry More Than Other Associates About A Softening Economy*, MINORITY L.J. STUDENT EDITION, Fall 2008 (citing special insert between pp. 18-20).

[192] Wilkins, *supra* note 181, at 564.

[193] Susan Hansen, *Survey Shows Recession's Impact on Minority Associates*, MINORITY L.J., OCT. 5, 2009 *available at* http://www.law.com/jsp/article.jsp?id=120243428 2398.

[194] Press Release, Corporations Cutting Costs by Embracing Smaller Law Firms (Apr. 17, 2009), http://www.pr. com/press-release/145797.

[195] Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409, 1411-14 (2009) (discussing the benefits of African American lawyers working within existing black communities—not larger firms).

IV. KEEPING THE PIPELINES FLOWING: SOLUTIONS

The pipeline to law school and into the legal profession starts at elementary school. Because numerous obstacles derail African American males at an early age from the path to obtaining a legal education, school districts should develop programs that enhance their academic offerings and increase the number of African American males graduating from high school and proceeding to college.[196]

Law schools, bar associations,[197] private organizations, and law firms must continue to develop programs to increase the number of minority law students in order to increase the number of African American male students in the pipelines to enter the legal profession. These programs must aim especially at recruitment and retention of African American male students. Even so, law schools must take bold new steps to develop potential African American male applicants.[198] Pre-law development programs may need to start in elementary or at least middle school and should be designed specifically for African American boys.[199]

The overuse or misuse of the LSAT continues to negatively impact the admission of African American students to law school.[200] Law schools should place less emphasis on LSAT scores and more on other predictors for success in law school. For example, the LSAC cites the following factors for law schools to consider, along with the LSAT scores: "[a] strong letter of recommendation or personal statement, work experience, or community service that demonstrates a special interest or strength of character, diversity status . . . graduate work or specialized studies . . . ."[201]

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[196] Angela Mae Kupenda, *Simply Put: How Diversity Can Benefit Whites and How Whites Can Simply Benefit Diversity*, 6 SEATTLE J. SOC. JUST. 649, 666, 667-69 (2008) (outlining the steps law schools could take to increase the number of African American males enrollees); MCSHEPARD, *supra* note 127, at 14-15 (providing policy recommendations to the educational enhancement of African American males); Arne Duncan, U.S. Sec'y of Educ., HBCUs and Higher Education: Beyond the Iron Triangle (Sept. 2, 2009) (discussing the crucial role that historical black colleges and universities can play in educating African American students).

[197] Susan Kostal, *The Diversity Pipeline: Plugging the Leak*, 33 S.F. ATT'Y 12 (2007); John Hocter, *Progress and Promise: Diversity in the Legal Profession*, 23 OHIO LAW. 6, 6-12 (2009) (describing initiatives in Ohio to diversify the legal profession).

[198] JACKSON CMTY. COLL., *supra* note 133, at 49-50 (identifying barriers that "impede African American males' success in education" and providing solutions).

[199] Charles R. Calleros, *Enhancing the Pipeline of Diverse K-12 and College Students to Law School: The HNBA Multi-Tier Mentoring Program*, 58 J. LEGAL EDUC. 327, 338-39 (2008).

[200] *See* Nussbaumer, *supra* note 152, at 180-81 ("[L]aw schools must be prohibited from misusing the LSAT contrary to LSAC guidelines.").

Law firms must reach beyond just the elite law schools and find diversity in other accredited law schools. Some initiatives include: developing mentoring programs, expanding summer clerkship programs to include African American males, and developing internal retention programs.[202] *Fortune* 500 corporations should exert economic pressures on law firms to provide legal services by requiring law firms to have aggressive diversity plans to recruit, hire, and promote African American males and other minorities in the firm.[203]

State and local bar associations should study and evaluate the status of African American male lawyers to determine whether more enter the profession today than in the past. Where African American male lawyers may confront roadblocks or obstacles, city or state bar associations should rally their members to actively support the advancement of African American lawyers into the field.[204] For example, state bar associations could evaluate how judges and prosecutors[205] are appointed and elected to determine whether the selection process negatively impacts African American lawyers. Because of their complexity, the pipelines to these positions require continual review. Judges and prosecutors, at all levels of the government, should also develop diversity plans.

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[201] *Pursue a Career in Law*, *supra* note 45.

[202] *Cf.* Linda E. Dávila, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403 (1987) (outlining a number of proposals to increase the number of Hispanics in law firms that would also apply to African Americans).

[203] Stephanie Francis Ward & Rachel M. Zahorsky, *Legal Rebels*, A.B.A. J., Sept. 2009, at 35, 42-43 (describing how corporate legal departments require law firms to have diversity at all levels of their firm to compete for work); RICK PALMORE, ASS'N OF CORPORATE COUNSEL, CALL TO ACTION: DIVERSITY IN THE LEGAL PROFESSION (2004), http://www.abanet.org/women/leadershipacademy/2010/handouts/calltoaction.pdf; James M. Finberg, *Diversity in the Legal Profession: National Failure, Local Progress*, S.F. ATT'Y, Spring/Summer 2005, at 6, 6-7.

[204] Chambliss, *supra* note 63, at 23-24.

[205] *A Basic Primer For Recruiting African American Prosecutors*, 28 PROSECUTOR 9 (1994) (outlining strategies for recruiting African American law students as prosecutors).

The process of selecting judicial clerks should include a mechanism to ensure that hiring practices, though neutral, do not unintentionally exclude African American males and other minority groups from these prestigious legal positions within the court. The pool of qualified applicants must be expanded to ensure diversity.[206]

Similarly, law schools must look beyond law professors who attended only certain law schools or served as judicial clerks when hiring tenure track law professor positions. Such systems further perpetuate the exclusion of qualified African American lawyers as law professors.

The various initiatives implemented by bar associations, law firms, and programs developed by law schools will not totally eliminate the barriers African American males face in their pursuit of a legal career. We must revamp our public education systems and incarceration policies to lessen the negative impact both systems have on the growth and development of African American male students.

CONCLUSION

The struggles and barriers faced by African American males to enter and advance into the legal field are almost insurmountable. Even with a history of legal victories to eliminate racial exclusion and segregation of African American males from law school, the number of African American males entering the legal field appears to have peaked. The legal community must vigorously renew its efforts and commitments to ensure African Americans, particularly African American males, have an equal opportunity to enter and advance in the legal profession.

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[206] *See* Christopher R. Benson, *A Renewed Call for Diversity Among Supreme Court Clerks: How a Diverse Body of Clerks Can Aid the High Court as an Institution*, 23 HARV. BLACKLETTER L.J. 23, 28-34 (2007) (outlining proposals to increase the number of minority clerks).

HOMELAND SECURITY PRESIDENTIAL DIRECTIVE-12, BACKGROUND INVESTIGATIONS, AND INFORMATIONAL PRIVACY RIGHTS

Colin M. O'Brien[*]

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INTRODUCTION

Privacy is a precious commodity in our society. We put locks on doors and file cabinets; we close our blinds at night; we develop pseudonyms to mask our identity online; we require confidentiality agreements in business transactions; we whisper into the ears of our friends and family; we keep secrets.

Nonetheless, we must often compromise our privacy to accommodate countervailing interests, both personal and societal. In response to the attacks of September 11, 2001, the federal government adopted an increasingly aggressive approach to national security matters.[1] Although security and privacy are not necessarily mutually exclusive, these security initiatives often stand in tension with notions of personal privacy. Thus, the interaction of privacy and security requires us to engage in the perilous balancing of the respective degrees of privacy and security necessary to ensure the continuation of our nation and its constitutional values.[2] If we refuse certain governmental intrusions into our private lives, such as the use of x-ray machines to scan our belongings at airports, we potentially compromise our personal and national security. At the same time, if we allow the government to peer into our private lives unnecessarily, we compromise the personal refuge from our own government the Constitution sought to provide.

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[1] *See, e.g.*, JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 12 (2007). Goldsmith, a former head of President Bush's Office of Legal Counsel, asserts many of the controversial legal and policy decisions of the Bush administration arose from the burdensome "fear of not doing enough to stop the next attack," and were ostensibly limited by the "fear of doing too much and ending up before a court or grand jury." *Id.* The balancing of these interests led to, among other things, "the Terrorist Surveillance Program, the Geneva Conventions, military commissions, interrogation techniques, [and] Guantanamo Bay." *Id.*

[2] *See* JACQUELINE KLOSEK, THE WAR ON PRIVACY 2-3 (2007) (assering that privacy has been eroded in the wake of 9/11).

In fall 2007, Dr. Robert Nelson, a contractor-employee and a leading researcher at NASA's Jet Propulsion Laboratory, challenged the federal government's balancing of employee privacy with the need to safeguard federal facilities and information systems.[3] Dr. Nelson filed suit alleging the Department of Commerce's, as well as NASA's, interpretation and implementation of President Bush's Homeland Security Presidential Directive-12 (HSPD-12) violated contractor-employees' constitutional right to informational privacy by requiring them to submit to a background investigation.[4] On appeal from a denial of the JPL contractors-employees' request for a preliminary injunction, the Ninth Circuit concluded that the plaintiffs had presented a case with an adequate likelihood of success to warrant a preliminary injunction.[5] The Supreme Court, however, granted certiorari and heard arguments in October 2010.[6]

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[3] Nelson v. NASA, 506 F.3d 713, 715-16 (9th Cir. 2007). Dr. Nelson "holds the rank of a Principal Scientist, the highest research classification at JPL, and currently leads NASA's New Millennium Program which tests or validates all new technology that NASA will use in space." First Amended Complaint for Injunctive & Declaratory Relief at 2-3, Nelson v. NASA, Case No. CV-07-05669 ODW(VBKx) (C.D. Cal. 2007), *available at* http://www.hspd12jpl.org/files/FirstAmendedComplaint.PDF at 2-3. Pursuant to a contract with NASA, the California Institute of Technology operates, manages, and oversees JPL; while NASA funds the research facility. *See* NASA Facts: Jet Propulsion Laboratory, http://www.jpl.nasa.gov/news/fact_sheets/jpl.pdf (last visited Dec. 10, 2007) (on file with Mississippi Law Journal). Thus, JPL employees are contractor-employees of the federal government.

[4] *See* First Amended Complaint for Injunctive & Declaratory Relief, *supra* note 3, at 2, 12-13. Dr. Nelson is the lead plaintiff representing other JPL employees in litigation aimed at thwarting NASA's implementation of background investigations required by the Department of Commerce's Personal Identity Verification Standard (PIV Standard). *Id.* at 2-3, 12-13; *see also* Andrew C. Revkin, *Suit Filed Over Security Steps at NASA Facility*, N.Y. TIMES, Aug. 31, 2007, at A15. Dr. Nelson maintains a useful website about the lawsuit, including links to court documents, commentary, and media coverage. The Fight AGAINST Homeland Security Presidential Directive-12, http://hspd12jpl.org/ (last visited Dec. 10, 2007) (on file with Mississippi Law Journal). A review of the forum on Dr. Nelson's website indicates wider discontent than suggested by the narrow JPL lawsuit. *See* HSPD12JPL.org Forum, http://www.hspd12jpl.org/ forum/ (last visited Dec. 10, 2007) (on file with Mississippi Law Journal).

HSPD-12 directed the Department of Commerce, in conjunction with other agencies, to develop a uniform federal standard for the identification credentials to be used by federal employees and contractor-employees, such as Dr. Nelson, to access federal facilities and information systems.[7] In response, the Department of Commerce promulgated the Personal Identity Verification (PIV) Standard,[8] a standard that applies to millions of federal employees, contractor-employees, and applicants for federal employment.[9] The PIV Standard requires federal workers to submit to a background investigation in order to obtain the PIV Credential.[10] As the workers must obtain a PIV Credential to access the facilities and information systems necessary to perform their jobs, the workers, in effect, must either acquiesce to the investigation or forfeit their jobs.[11] Among other things, the background investigation requires the federal workers to disclose information about treatment for prior substance abuse as well as sign a release that facilitates further investigation into their financial history, mental and emotional stability, and general behaviors.[12] Yet, the purpose of the investigation is solely to verify the identity of the individual; it is not intended to assess their qualifications for employment or security clearances.[13]

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[5] Nelson v. NASA, 530 F.3d 865, 877-82 (9th Cir. 2008).

[6] NASA v. Nelson, 130 S. Ct. 1755 (2010); Supreme Court of the United States October Term 2010, http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2010.pdf (on file with Mississippi Law Journal).

[7] Homeland Security Presidential Directive/HSPD-12: Policy for a Common Identification Standard for Federal Employees and Contractors, 40 Weekly Comp. Pres. Doc. 1709-10 (Aug. 27, 2004), *available at* http://www.dhs.gov/xabout/laws/gc_1217616624097.shtm [hereinafter HSPD-12]. HSPD-12 instructs the Department of Commerce to promulgate the standard "in consultation with the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of Office of Management and Budget (OMB), and the Director of the Office of Science and Technology Policy." *Id.* ¶ 2.

[8] *See generally* Computer Sec. Div., U.S. Dep't of Commerce Nat'l Inst. of Standards & Tech., Fed. Info. Processing Standards Publ'n 201-1, Personal Identity Verification (PIV) of Federal Employees and Contractors (2006), *available at* http://csrc.nist.gov/publications/fips/fips201-1/FIPS-201-1-chng1.pdf [hereinafter FIPS 201]. The National Institute of Standards and Technology (NIST) is "a non-regulatory federal agency within the U.S. Department of Commerce." NIST General Information, http://www.nist.gov/public_affairs/general-information.cfm (last visited Sept. 24, 2010) (on file with Mississippi Law Journal). The Office of Management and Budget (OMB) has issued guidance to the federal agencies and departments implementing the PIV Standard. *See generally* Joshua B. Bolten, Office of Mgmt. & Budget, Executive Office of the President, OMB M-05-24, Memorandum for the Heads of All Departments and Agencies: Implementation of Homeland Security Presidential Directive (HSPD) 12 - Policy for a Common Identification Standard for Federal Employees and Contractors (2005), *available at* http://www.whitehouse.gov/omb/memoranda/fy2005/m05-24.pdf [hereinafter OMB Guidance Document].

[9] As of March 1, 2010, the government had completed background investigations on 858,941 contractors and had issued HSPD-12 credentials to 689,725 contractors. IDManagement.gov, http://www.idmanagement.gov/ (follow "Current Status HSPD-12" hyperlink) (last visited Mar. 1, 2010).

This Article contends the PIV Standard violates the constitutional right to informational privacy of those federal employees and contractor-employees subject to the background investigation. Part I provides a brief overview of Homeland Security Presidential Directives, a newly developed form of executive legislation, as well as an overview of HSPD-12, the PIV Standard, and the required background investigations. While Part II generally discusses the Supreme Court and circuit court jurisprudence on the constitutional right to informational privacy, Part III identifies the aspects of the background investigation that trigger the protection of the informational privacy right and balances the government's narrow interest in identity verification against the federal workers' privacy interests. This Article concludes that the PIV Standard's background investigation violates the workers' informational privacy rights because the workers' privacy interests outweigh the government's narrow interest in obtaining the information sought, much of which bears no relation to identity verification.

I. BACKGROUND

Part I.A first discusses the relationship among Homeland Security Presidential Directives, National Security Directives,

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[10] *See infra* Part I.C, I.D.

[11] *See* FIPS 201, *supra* note 8, at 5-6.

[12] *See infra* Part I.D.

[13] *See infra* Part III.B.

Executive Orders, and Presidential Proclamations. Subsequently, Parts I.B, I.C, and I.D discuss HPSD-12, the resulting PIV Standard, and the PIV Standard's background investigation, respectively.

A. *Brief Overview of Presidential Legislation*

The recurring debate about the scope of presidential powers and the role of a president in relation to Congress, the judiciary, and the people[14] disputatiously surfaced during President Bush's tenure.[15] The expansiveness or narrowness of presidential power aside,[16] historically, presidents have employed an array of methods to implement the policies of Congress and the courts as well as "to make unilateral policy without interference from either Congress or the courts."[17] In effect, Presidents have passed quasi-legislation or "presidential legislation."[18]

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[14] *Compare An Old Whig V*, PHILA. INDEP. GAZETTEER, Nov. 1, 1787, http://teachingamericanhistory.org/library/index.asp?document=1943, *and Cato IV*, N.Y. J., Nov. 8, 1787, http://teachingamericanhistory.org/library/index.asp?document=1950, *and Cato V*, N.Y. J., Nov. 22, 1787, http://teachingamericanhistory.org/library/index.asp? document=1638, *with* THE FEDERALIST NO. 67 (Alexander Hamilton) (each on file with Mississippi Law Journal). *See also* Letter from Thomas Jefferson to John C. Breckinridge (Aug. 12, 1803), http://teachingamericanhistory.org/library/index.asp?document= 1915.

[15] *See generally*, *e.g.*, GOLDSMITH, *supra* note 1; David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFF. 75 (2007); Alexandra R. Harrington, *Presidential Powers Revisited: An Analysis of the Constitutional Powers of the Executive and Legislative Branches Over the Reorganization and Conduct of the Executive Branch*, 44 WILLAMETTE L. REV. 63 (2007); John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565 (2007).

[16] For an analysis of the scope of presidential powers, see generally PETER M. SHANE & HAROLD H. BRUFF, THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS (1988). As one commentator has noted, even "different presidents have held quite different understandings of their own role and authority." PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 4 (2002).

[17] KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWERS 4 (2001); *see also* William D. Neighbors, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 105 n.5 (1964) ("The term presidential legislation is used to mean acts of the President which implement the laws and policies as declared by Congress and the courts or to effect a policy which the President, himself, deems desirable.").

Presidential legislation appears most frequently as an executive order or presidential proclamation.[19] These tools of presidential legislation "are formal instruments of government action . . . [whose] validity rests on the constitutional or statutory authority advanced to support them."[20] Generally, presidential proclamations "affect primarily the activities of private individuals"[21] and are "'used primarily . . . for ceremonial purposes . . . ."[22] In contrast, "Executive orders are directives issued by the [P]resident to officers of the executive branch, requiring them to take an action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they will henceforth be responsible for the implementation of law."[23] Thus, executive orders, in theory, only indirectly affect private citizens.[24] Executive orders and proclamations appeal to presidents for several reasons. For example, they circumvent the strictures of the Administrative Procedure Act and the corresponding scrutiny of public notice and participation.[25] Additionally, a president may promulgate executive orders and proclamations with relative ease when compared to navigating a bill through the bicameral process.[26] Indeed, "[t]he only general statutory requirement is for publication of executive orders and proclamations in the *Federal Register*."[27]

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[18] Neighbors, *supra* note 17, at 105 n.5. The President has engaged in this quasi-legislation even though the Constitution vests legislative power in Congress. U.S. CONST. art. I, § 1; *see also* Neighbors, *supra* note 17, at 105.

[19] Neighbors, *supra* note 17, at 105. Although historically less common and less controversial, presidential signing statements have recently engendered significant debate. *See generally, e.g.*, Chad Thompson, *Presidential Signing Statements: The Big Impact of a Little Known Presidential Tool*, 39 U. TOL. L. REV. 185 (2007); Symposium, *The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 1 (2007).

[20] COOPER, *supra* note 16, at 4. The often muddled reliance on a mixture of statutory and constitutional authority often leaves the substance and use of these executive tools "dwell[ing] in Justice Jackson's zone of twilight, where authority is neither clearly present nor absent." SHANE & BRUFF, *supra* note 16, at 88.

[21] COOPER, *supra* note 16, at 16.

[22] MAYER, *supra* note 17, at 34 (quoting Neighbors, *supra* note 17, at 106).

[23] COOPER, *supra* note 16, at 16. Presidents have relied on executive orders to "almost single-handedly create[] the federal government's classification system for national security information, as well as the personnel clearance process that determines whether individuals will have access to that information." MAYER, *supra* note 17, at 6. For a discussion of the relationship between security clearance procedures, HSPD-12, and the PIV Standard's investigation requirements, see discussion *infra* Part I.D.

[24] COOPER, *supra* note 16, at 16. However, administrations have at times blurred this distinction by promulgating executive orders that have "directly affected the property of citizens and companies . . . ." *Id.* at 16 & 251 n.6 (citing as examples of cases upholding such executive orders, United States v. Or. & Cal. R.R., 176 U.S. 28 (1900) and Menotti v. Dillon, 167 U.S. 703 (1897)); MAYER, *supra* note 17, at 34-35 ("The argument that executive orders are targeted at the behavior of executive branch officials

Despite the benefits of executive orders and presidential proclamations, presidents often rely on a separate tool of presidential legislation to implement military and foreign policy initiatives: the National Security Directive (NSD).[28] President Johnson, according to commentators, offered the most apt definition of an NSD, defining it as "a formal notification to the head of a department or other government agency informing him of a presidential decision in the field of national security affairs and generally requiring follow-up action by the department or agency addressed."[29] Thus, presidents typically use NSDs "to implement and coordinate military policy, foreign policy, or anything else that is defined within the rubric of national security."[30] NSDs carry the same force and effect as ex-

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and not the public at large reflects a limited and formalistic perspective of public administration. One could hardly classify in this way Reagan's Executive Order 12291, which fundamentally reshaped the regulatory process, or the series of civil rights orders which directed executive branch officials to use their power and resources to effect substantial and dramatic social change.").

[25] COOPER, *supra* note 16, at 17.

[26] *Id.*

[27] *Id.* at 18; Federal Register Act, ch. 417, 49 Stat. 501 (1935) (codified as amended at 44 U.S.C. § 1505(a)(1) (2006)).

[28] *See* COOPER, *supra* note 16, at 144. President George H.W. Bush styled this presidential tool as the "National Security Directive" or "NSD." *Id.* However, presidents have referred to NSDs by an array of names: National Security Council Policy Papers (Presidents Truman and Eisenhower), National Security Action Memorandum (President Johnson), Presidential Directives (President Carter), National Security Decision Directives (President Reagan), Presidential Decision Directives (President Clinton), and National Security Presidential Directives (President George W. Bush). *Id.*

[29] *Id.* (quoting BROMLEY K. SMITH, ORGANIZATIONAL HISTORY OF THE NATIONAL SECURITY COUNCIL DURING THE KENNEDY AND JOHNSON ADMINISTRATIONS 23 (1988)).

[30] *Id.* Nonetheless, NSDs have at times had a "significant domestic impact." *Id.* at 145.

ecutive orders; however, by stylizing the presidential legislation as an NSD, presidents obtain increased flexibility because the Federal Register Act does not expressly apply to NSDs.[31] In fact, presidents classify as secret the "vast majority" of NSDs and "[m]ost administrations to date have refused to notify Congress of the existence of NSDs, to provide copies if they are specifically requested by Congress, or to send witnesses to testify at hearings on the subject."[32]

In 2001, President George W. Bush added to the arsenal of executive tools by creating the Homeland Security Presidential Directive (HSPD).[33] Much like Franklin D. Roosevelt developed NSDs in response to Pearl Harbor as "mechanism[s] to coordinate communications, decisionmaking, implementation, and accountability for foreign and military action,"[34] President Bush developed HSPDs after September 11, 2001 to "record and communicate presidential decisions about the homeland security policies of the United States."[35] President Bush issued twenty-five HSPDs[36] "on matters pertaining to Homeland Security."[37] These directives cover divergent topics, such as maritime security,[38] public health preparedness,[39] and domestic nuclear detection.[40] The common thread linking these HSPDs is that each requires federal departments and agencies to implement President Bush's homeland security policies.[41]

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[31] *Id.* at 144-45.

[32] *Id.* at 145. In a circular fashion, presidents have primarily used the executive order, instead of congressional legislation, to define the procedures and requirements for classifying NSDs. *See supra* note 21.

[33] *See infra* note 35 and accompanying text.

[34] COOPER, *supra* note 16, at 145.

[35] Homeland Security Presidential Directive/HSPD-1: Organization and Operation of the Homeland Security Council, 37 WEEKLY COMP. PRES. DOC. 1568-70 (Oct. 29, 2001), *available at* http://www.dhs.gov/xabout/laws/gc_1213648320189.shtm [hereinafter HSPD-1]. All HSPDs cited herein are listed and, if unclassified, available at National Security Presidential Directives [NSPD]: George W. Bush Administration, http://www.fas.org/irp/offdocs/nspd/index.html [hereinafter FAS Unofficial NSPD & HSPD Website] (last visited June 10, 2010). The Department of Homeland Security maintains a site containing publicly available HSPDs. Department of Homeland Security, Homeland Security Presidential Directives, http://www.dhs.gov/xabout/laws/editorial_0607.shtm [hereinafter DHS: HSPD Website] (last visited June 10, 2010). The following notes indicate whether the Directive is available at both websites or merely identified by the former.

[36] *See* DHS: HSPD Website, *supra* note 35.

[37] *Id.*

President Bush's use of HSPDs signals that HSPDs will serve as the domestic counterpart to NSDs. President Bush has given credibility to this comparison by jointly issuing NSPD-43[42] and HSPD-14, directives designed "to prevent radiological and nuclear attacks" at home and abroad.[43] In fact, as is common with NSDs, President Bush classified several HSPDs.[44] Thus, these directives appear more like the flexible NSD than an executive order or presidential proclamation.[45] And like

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[38] Homeland Security Presidential Directive/HSPD-13: Maritime Security Policy (Dec. 21, 2004), DHS: HSPD Website, *supra* note 35, *also available at* FAS Unofficial NSPD & HSPD Website, *supra* note 35 (both on file with Mississippi Law Journal).

[39] Homeland Security Presidential Directive/HSPD-21: Public Health and Medical Preparedness, 43 WEEKLY COMP. PRES. DOC. 1364-72 (Oct. 18, 2007), *available at* DHS: HSPD Website, *supra* note 35, *also available at* FAS Unofficial NSPD & HSPD Website, *supra* note 35 [hereinafter HSPD-21].

[40] Homeland Security Presidential Directive/HSPD-14: Domestic Nuclear Detection (Apr. 15, 2005), FAS Unofficial NSPD & HSPD Website, *supra* note 35 (on file with Mississippi Law Journal); *see also* OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HOMELAND SECURITY, OIG-08-19, DHS' DOMESTIC NUCLEAR DETECTION OFFICE PROGRESS IN INTEGRATING DETECTION CAPABILITIES AND RESPONSE PROTOCOLS 1-3 (2007), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-19_Dec07.pdf [hereinafter OIG-08-19] (discussing the initiatives contained in HSPD-14).

[41] *See* HSPD-1, *supra* note 35 (describing HSPD-1 as "the first in a series of Homeland Security Presidential Directives that shall record and communicate presidential decisions about the homeland security policies of the United States").

[42] President Bush stylizes NSDs as National Security Presidential Directives (NSPDs). *See supra* note 28.

[43] OIG-08-19, *supra* note 40, at 3; *see also* NSPD 43 / HSPD 14: Domestic Nuclear Detection Office, Department of Homeland Security, Fact Sheet (Apr. 15, 2005), http://www.fas.org/irp/offdocs/nspd/nspd-43fs.html (noting that while the initiatives are "focused on domestic detection, its coordinating work will enhance U.S. efforts overseas through the design of a global nuclear detection architecture").

[44] *See, e.g.*, FAS Unofficial NSPD & HSPD Website, *supra* note 35 (denoting HSPD-15 as a "classified directive"). On its website, the Department of Homeland Security identifies existing HSPDs; however, the site does not provide links to classified HSPDs and some are not even listed. *Compare* DHS: HSPD Website, *supra* note 35 (failing to link HSPDs 15 and 23, while failing to list HSPDs 14 and 22), *with* FAS Unofficial NSPD & HSPD Website, *supra* note 35 (identifying HSPDs 1 through 25).

[45] The flexibility of HSPDs, coupled with their domestic scope, may encourage presidents to shift towards using HSPDs in place of executive orders. In fact, the initiatives of some HSPDs already signal such an encroachment into the traditional domain

NSDs, HSPDs should carry the same force and effect as executive orders and presidential proclamations, but should not fall within the coverage of the Federal Register Act, which contains no explicit reference to HSPDs.[46] Nonetheless, like any executive tool, HSPDs must derive their authority from either the Constitution or statutes.[47]

B. The 9/11 Commission, Uniform Identification, and Homeland Security Presidential Directive-12

After the attacks of September 11, 2001 re-exposed America's vulnerability to terrorism, President Bush and Congress launched the National Commission on Terrorist Attacks Upon the United States (9/11 Commission).[48] The 9/11 Commission was tasked with investigating and detailing the circumstances preceding and immediately following the attacks.[49] Additional-

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of the Executive Order. *Compare* Homeland Security Presidential Directive/HSPD-20: National Continuity Policy, 43 WEEKLY COMP. PRES. DOC. 593-98 (May 4, 2007), *available at* DHS: HSPD Website, *supra* note 35, *also available at* FAS Unofficial NSPD & HSPD Website, *supra* note 35, *with* Exec. Order No. 12,656, 3 C.F.R. 585 (1988) (establishing "National Security Emergency Preparedness Policy"). *See also* Spencer S. Hsu, *Bush Changes Continuity Plan; Administration, Not DHS, Would Run Shadow Government*, WASH. POST, May 10, 2007, at A12.

[46] 44 U.S.C. § 1501 (defining documents covered by the Federal Register Act as "a Presidential proclamation or Executive order and an order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument, issued, prescribed, or promulgated by a Federal agency"); *see also supra* text accompanying note 31. As a newly developed executive tool, the precise legal contours of HSPDs have not yet been delineated by the courts.

[47] *See supra* note 20 and accompanying text. President Bush and other presidents have traditionally begun executive orders with a recitation, albeit general at times, of the statutory or constitutional authority on which the order relies. *See, e.g.*, Exec. Order No. 10,000, 3 C.F.R. 792 (1943-1948). Perhaps problematically, President Bush departed from this practice and consistently issued HSPDs with no identification, general or otherwise, of the authority on which the directives rely. *See, e.g.*, HSPD-21, *supra* note 39, *available at* DHS: HSPD Website, *supra* note 35, *also available at* FAS Unofficial NSPD & HSPD Website, *supra* note 35; HSPD-1, *supra* note 35, *available at* DHS: HSPD Website, *supra* note 35, *also available at* FAS Unofficial NSPD & HSPD Website, *supra* note 35. Thus, HSPDs may dwell deeper in the obscure depths of Justice Jackson's twilight zone than executive orders. *See supra* note 20 and accompanying text.

[48] Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, §§ 601-611, 116 Stat. 2383, 2408-13 (2002).

[49] *Id.* § 602(1)-(5).

ly, the 9/11 Commission was ordered to develop and recommend corrective measures the government could adopt to prevent future terrorist attacks.[50]

One such preventive measure advised by the 9/11 Commission was for the "federal government [to] set standards for the issuance of birth certificates and sources of identification, such as drivers [sic] licenses."[51] The 9/11 Commission noted the use of American identification credentials in preparation for, and facilitation of, the terrorist attacks.[52] Although some of the hijackers had legitimately obtained these identification credentials, some obtained them by fraud.[53] The recommendation concluded "[f]raud in identification documents is no longer just a problem of theft [because at] many entry points to vulnerable facilities . . . sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists."[54] Thus, the 9/11 Commission reasoned a uniform standard would decrease a terrorist's ability to obtain an American identification credential that could facilitate an attack.[55]

President Bush and Congress have already taken multiple steps to respond to the 9/11 Commission's recommendation regarding identification cards.[56] In December 2004, President

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[50] *Id.* § 602(5). Although the 9/11 Commission developed recommendations for improvements, it refrained from expressly concluding whether increased vigilance prior to the 9/11 attacks would have provided the government with "an opportunity to disrupt the plot." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 265 (2004), *available at* http://govinfo.library.unt.edu/911/report/index.htm [hereinafter 9/11 COMMISSION REPORT].

[51] 9/11 COMMISSION REPORT, *supra* note 50, at 390.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See id.*

[56] *See infra* notes 57-60 and accompanying text; *see also* CRS REPORT FOR CONGRESS, 9/11 COMMISSION RECOMMENDATIONS: IMPLEMENTATION STATUS 35-36 (2006), http://cipp.gmu.edu/archive/15_911CommissionRecomm_December06.pdf. Nonetheless, President Bush was criticized for failing to implement all of the 9/11 Commission recommendations, as well as moving too slowly in implementing the recommendations upon which he had looked favorably. *See, e.g.*, DEMOCRATIC POLICY COMMITTEE, VITAL 9/11 COMMISSION RECOMMENDATIONS REMAIN INCOMPLETE, UNADDRESSED (2007), http://dpc.senate.gov/dpcdoc.cfm?doc_name=fs-110-1-26.

Bush signed into law the Intelligence Reform and Terrorism Prevention Act.[57] This Act established a framework for developing new federal standards for identification credentials such as birth certificates, driver's licenses, personal identification cards, air travel identification credentials, and passports.[58] Further, the Act mandated increased use of passports for travel within the Western Hemisphere.[59] Subsequently, Congress enacted the REAL ID Act of 2005 which provided new guidelines for state-issued driver's licenses and personal identification cards.[60]

While Congress debated the REAL ID Act, President Bush also responded to the 9/11 Commission's recommendation with his newly developed executive tool: the HSPD. On August 27, 2004, only one month after the public release of the 9/11 Commission's recommendations, President Bush issued HSPD-12, entitled "Policy for a Common Identification Standard for Federal Employees and Contractors."[61] The overarching purpose of HSPD-12 was to guard against terrorism by eliminating "[w]ide variations in the quality and security of forms of identification used to gain access to secure Federal and other facilities where there is potential for terrorist attacks . . . ."[62]

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[57] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

[58] *Id.* § 7211 ("Minimum Standards for Birth Certificates"), § 7212 ("Driver's Licenses and Personal Identification Cards"), § 7213 ("Social Security Cards and Numbers"), § 7214 ("Prohibition of the Display of Social Security Account Numbers on Driver's Licenses or Motor Vehicle Registrations"), § 7217 ("Study on Allegedly Lost or Stolen Passports"); § 7220 ("Identification Standards" for credentials used in airline travel); *see also* CRS REPORT FOR CONGRESS, *supra* note 56, at 35-36.

[59] CRS REPORT FOR CONGRESS, *supra* note 56, at 36. This "new requirement that United States citizens present passports when traveling by air to and from Canada, Mexico, Bermuda and countries in the Caribbean" caused a "crush of [passport] applications," which resulted in a substantial backlog in the State Department with significant delays in the issuance of passports. Michelle Higgins, *Your Passport May Be in the Mail*, N.Y. TIMES, Sept. 23, 2007, § 5, at 6.

[60] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005); *see also* CRS REPORT FOR CONGRESS, *supra* note 56, at 35-36. The Act requires driver's licenses to possess "[p]hysical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes," as well as "common machine-readable technology . . . ." §§ 202(b)(8)-(9). Similarly, HSPD-12 required the Department of Commerce to develop its identification credential to resist fraud, permit electronic authentication, as well as ensure interoperability among agencies and departments. *See infra* note 69 and accompanying text. For a comparison of the REAL ID Act's identification verification requirements to the requirements imposed by the PIV Standard, see *infra* text accompanying notes 231-36.

Technically, the REAL ID Act does not mandate that states develop driver's licenses that satisfy these requirements. *See* § 202(a)(1). However, it heavy-handedly pressures states to do so as it prohibits federal agencies from accepting non-compliant licenses or identification cards "for any official purpose" – a broad reaching prohibition. *Id.* Thus, the Department of Homeland Security has encountered significant resistance to the REAL ID Act requirements from both civil liberty organizations and states because of compliance costs, privacy concerns, and fear the Act creates a national identity card.

To accomplish this purpose, HSPD-12 instructed the Department of Commerce to promulgate a universal federal standard for identification credentials used by federal employees and contractor-employees to access federal facilities and information systems.[63] As guidance, HSPD-12 articulated four objectives the Department of Commerce's standard should satisfy.[64] The standard must ensure the identification credential 1) "is issued based on sound criteria for verifying an individual employee's identity"; 2) "is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation"; 3) is capable of rapid electronic authentication; and 4) is issued only by properly accredited providers.[65]

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[61] *See generally* HSPD-12, *supra* note 7. The 9/11 Commission released its public report on July 22, 2004. National Commission on Terrorist Attacks Upon the United States, http://www.9-11commission.gov/ (last visited Sept. 30, 2010).

[62] HSPD-12, *supra* note 7, ¶ 1. Similarly, in the December Intelligence Reform and Terrorism Prevention Act of 2004, a provision required the Department of Homeland Security to recommend to Congress "categories of Federal facilities that the Secretary determines to be at risk for terrorist attack and requiring minimum identification standards for access to such facilities . . . ." § 7220(d)(1), 118 Stat. at 3838.

[63] HSPD-12, *supra* note 7, ¶ 2. The Directive contemplates the Department of Commerce will act in consultation with other agencies. *See id.*

[64] *Id.* ¶ 3. The purpose of these objectives was to ensure the standard would result in "[s]ecure and reliable forms of identification." *Id.*

[65] *Id.* ¶ 3(a)-(d). HSPD-12 also required the Department of Commerce's standard to "include graduated criteria, from least secure to most secure, to ensure flexibility in selecting the most appropriate level of security for each application." *Id.* ¶ 3.

C. The Personal Identity Verification (PIV) Standard and the PIV Credential

In response to HSPD-12, the Department of Commerce developed the two-part PIV Standard.[66] Part one of the PIV Standard purports to establish the requirements necessary for the PIV identification credential to satisfy HSPD-12's "control and security objectives . . . , including personal identity proofing, registration, and issuance."[67] This part directs the background investigations analyzed below.[68] Part two of the PIV Standard details the technical components and physical features of the PIV Credential.[69]

The PIV Standard applies almost universally to employees and contractor-employees of federal agencies and departments.[70] The Office of Management and Budget (OMB) issued guidance making the PIV Standard applicable to all statutorily defined executive departments and agencies,[71] as well as the

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[66] FIPS 201, *supra* note 8, at v.

[67] FIPS 201, *supra* note 8, at iii, 4-8.

[68] *See infra* Part I.D.

[69] FIPS 201, *supra* note 8, at iii-iv, 9-44. The technical specifications include features to ensure interoperability of the PIV Credential amongst federal agencies and departments as well as its rapid electronic authentication. *Id.* at iii-iv. Part two also describes the use of biometric features and the "card elements, system interfaces, and security controls required to securely store, process, and retrieve identity credentials from the card." *Id.* These PIV Standard requirements are beyond the scope of this Article.

[70] *See id.* at v. The Department of Commerce generically indicated the PIV Standard would apply to any "identification issued by Federal departments and agencies to Federal employees and contractors (including contractor employees) for gaining physical access to Federally controlled facilities and logical access to Federally controlled information systems except for 'national security systems'" as defined by statute and expressly excluded by HSPD-12 ¶ 3. *Id.* The Office of Management and Budget subsequently issued guidance clarifying the expansive scope of the PIV Standard. *See infra* note 71 and accompanying text.

[71] OMB GUIDANCE DOCUMENT, *supra* note 8, at 2 (applying the PIV Standard to "Executive departments and agencies listed in title 5 U.S.C. § 101, and the Department of Homeland Security . . . .") (internal quotations omitted). Thus, the PIV Standard governs the Department of State, Department of the Treasury, Department of Defense, Department of Justice, Department of the Interior, Department of Agriculture, Department of Commerce, Department of Labor, Department of Health and Human Services, Department of Housing and Urban Development, Department of Transportation, Department of Energy, Department of Education, Department of Veteran Affairs, and the Department of Homeland Security. 5 U.S.C. § 101 (2006).

U.S. Postal Service, and all other independent establishments within the executive branch.[72] Thus, an employee or contractor-employee[73] of a covered federal agency, department, or other entity must obtain a PIV Credential if his or her job requires access to a federally controlled facility or information system.[74]

D. The PIV Standard's Background Investigation Requirement

Although HSPD-12 lacks any express reference to background investigations,[75] the PIV Standard requires federal employees and contractor-employees to submit to a background investigation.[76] The level of investigation varies according to the risk level associated with a worker's position.[77] At a minimum, the employee or contractor-employee must submit to a National Agency Check with Inquiries (NACI) investigation, an investigation to which certain government workers must already submit.[78] Failure to complete an investigation effectively terminates the worker as he or she will not receive the PIV Credential necessary to access the facility or information system required for his or her job.[79]

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[72] OMB GUIDANCE DOCUMENT, *supra* note 8, at 2. The OMB guidance strongly encourages, but fails to require, government corporations to implement the PIV Credential. *Id.* A government corporation is "a corporation owned or controlled by the Government of the United States . . . ." 5 U.S.C. § 103(1) (2006).

[73] The OMB guidance does exclude some individuals from the coverage of the PIV Standard. OMB GUIDANCE DOCUMENT, *supra* note 8, at 2-3. For example, "[o]ccassional visitors to Federal facilities to whom you would issue temporary identification" are excluded. *Id.* at 2. Moreover, the guidance also exempts "[i]ndividuals under contract to a department or agency, requiring only intermittent access to federally controlled facilities." *Id.* at 3.

[74] OMB provides an equally expansive definition of federally controlled facilities, identifying four specific examples: 1) "[f]ederally-owned buildings or leased space, whether for single or multi-tenant occupancy, and its grounds and approaches, all or any portion of which is under the jurisdiction, custody or control of a department or agency"; 2) "[f]ederally controlled commercial space shared with non-government tenants"; 3) "[g]overnment-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities"; and 4) "[f]acilities under a management and operating contract." *Id.*

Similarly, OMB broadly applies the PIV Standard to credentials used to access "[i]information systems used or operated by an agency or by a contractor of an agency or other organization on behalf of any agency," as well as those systems defined by the Federal Information Security Management Act of 2002. *Id.* Where employees or contractor-employees access an information system "from a non-Federally controlled facility (e.g. a researcher up-loading data through a secure website or a contractor accessing a government system from their own facility)," the application of the PIV Standard depends upon the agency or department's pre-existing risk assessment. *Id.* However, HSPD-12 explicitly precludes application of the PIV Standard to credentials used to access "national security systems" as defined by statute. HSPD-12, *supra* note 7, ¶ 3. A "'national security system'" includes any information system, the "function, operation, or use of which . . . involves intelligence activities; . . . equipment that is an integral part of a weapon or weapons system; . . . is critical to the direct fulfillment of military or intelligence missions;" or information classified in the "interest of national defense or foreign policy." 44 U.S.C. § 3542(b)(2)(A) (2006).

[75] *See* HSPD-12, *supra* note 7.

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[76] FIPS 201, *supra* note 8, at 5-6, 53-56, 66; *see also* OMB GUIDANCE DOCUMENT, *supra* note 8, at 5-6. In addition to the background investigations, the employee or contractor-employee must appear in-person prior to receiving the PIV Credential and must also provide two identification sources. FIPS 201, *supra* note 8, at 5-6. The two identification sources presented must be identified in "the list of acceptable documents included in *Form 1-9, OMB No. 1115-0136, Employment Eligibility Verification*," and one must be a valid, government-issued picture identification. *Id.* at 6. The PIV Standard also guards against internal malfeasance by adhering "to the principle of separation of duties to ensure that no single individual has the capability to issue a PIV credential without the cooperation of another authorized person." *Id.*

[77] *Compare* U.S OFFICE OF PERSONNEL MANAGEMENT, STANDARD FORM 85: QUESTIONNAIRE FOR NON-SENSITIVE POSITIONS (1995), *available at* http://www.opm.gov/forms/pdf_fill/SF85.pdf [hereinafter SF 85], *with* U.S. OFFICE OF PERSONNEL MANAGEMENT, STANDARD FORM 85P: QUESTIONNAIRE FOR PUBLIC TRUST POSITIONS (1995), *available at* http://www.opm.gov/forms/pdf_fill/SF85P.pdf [hereinafter SF 85P], *and* U.S. OFFICE OF PERSONNEL MANAGEMENT, STANDARD FORM 86: QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS (2008), *available at* http://www.opm.gov/forms/pdf_fill/SF86.pdf [hereinafter SF 86]. HSPD-12 contemplated that different standards would apply to identity verification and security needs based on the different risks associated with a particular individual. *See* HSPD-12, *supra* note 7, ¶ 3.

[78] Federal agencies and departments have consistently required workers in "sensitive" positions to submit to, at a minimum, an NACI investigation. *See generally* 5 C.F.R. § 732 (2009) (implementing Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953)); *see also* Cole v. Young, 351 U.S. 536, 544-45 (1956) (limiting, in part, the reach of Exec. Order No. 10,450 to sensitive positions). First, an agency must determine if a position is sensitive or non-sensitive. *Id.* § 732.201(a) (implementing Exec. Order No. 10,450 by requiring heads of departments and agencies to designate "any position . . . the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security . . . as a sensitive position"). Sensitive positions (also known as national security positions) are those that "require regular use of, or access to, classified information," and involve government activities "concerned with the protection of the nation from foreign aggression or espionage, . . . intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States . . . ." *Id.* § 732.102(a)(1)-(2). If an agency or department deems a position sensitive, it must then sub-designate the position as special sensitive, critical sensitive, or non-critical sensitive, as determined based on the position's capacity to facilitate a "material adverse effect on the national security." *Id.* § 732.201(a). The federal government has long subjected workers in, or applicants for, these positions to comparable, and often more intrusive, security clearance background

Non-sensitive contractor-employees,[80] such as Dr. Nelson and the other JPL employees involved in the *Nelson v. NASA*

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investigations than the PIV Standard's minimum NACI investigation. *See* SF 86, *supra* note 77; *see also supra* note 23 (discussing the use of presidential legislative tools, namely the executive order, to develop security clearance processes).

Similarly, competitive service employees and applicants for such positions must submit to a suitability background investigation. 5 C.F.R. § 731.106(c)(1) (2009) (implementing Exec. Order No. 10,577, 3 C.F.R. 218 (1954-1958) and 5 U.S.C. § 3301 (2006)). The department or agency must designate each position held by a "competitive service employee" (defined *infra*) as "high, moderate, or low risk" based on the position's ability to facilitate an "adverse impact to the efficiency and integrity of the service." *Id.* § 731.106(a). High and moderate risk positions are deemed public trust positions. *Id.* § 731.106(b). At a minimum, these employees and applicants must submit to the same investigation process required by the PIV Standard. *See* SF 85, *supra* note 77; SF 85P, *supra* note 77.

Because the PIV Standard's investigation requirement, an ostensible implementation of HSPD-12, reaches the competitive service employees as well as employees and contractors requiring security clearances; as a practical matter, the investigation requirement predominantly affects non-sensitive contractor-employees and non-competitive service employees. Nonetheless, given the government's narrow interest in identity verification, *see infra* Part III.B, the PIV Standard's NACI investigation is legally invalid with respect to all employees or contractor employees, regardless of the position or sensitivity level. *See infra* Part III and Conclusion.

Moreover, the seemingly narrow effect, practically speaking, of an invalidation of the PIV Standard's investigation requirement would actually carry a substantial punch. By definition, sensitive positions are extremely limited, and, thus, would exclude the vast majority of contractor-employees from sensitive security clearance investigations. *See* 5 C.F.R. § 732.102(a)(1)-(2). Similarly, contractors, by definition – and some federal employees as well – are not competitive service employees subject to the aforementioned suitability investigations. *See id.* § 731.101(a). Competitive service employees currently subject to suitability investigations are those individuals in, or applying to, 1) "civil service positions in the executive branch," 2) "civil services positions not in the executive branch which are specifically included in the competitive service by statute," and 3) "positions in the government of the District of Columbia which are specifically included in the competitive service by statute." 5 U.S.C. § 2102(a) (2006). Further, the term "civil service" used above consists only of "appointive positions in the executive, judicial, and legislative branches of the Government of the United States . . . ." *Id.* § 2101(1). Thus, numerous contractor-employees, including those involved in the JPL litigation, as well as other federal employees not constituting "competitive service employees" will feel a significant impact from an invalidation or sustainment of the PIV Standard's background investigation requirement.

[79] *See supra* note 9 and accompanying text; *see also infra* note 82.

[80] *See supra* note 78.

litigation, must submit to the least searching NACI investigation.[81] The contractor-employee seeking a PIV Credential (the applicant) must first complete Standard Form 85 (SF 85).[82] SF 85 requires the applicant to provide information commonly associated with one's identity: one's full name, date and place of birth, social security number, aliases, gender, citizenship, and mother's maiden name.[83] The applicant must also account for his or her residency, educational history, and employment history, going back five years.[84] Then, the applicant must supply the contact information of former landlords or others who may confirm his or her residency, academic institutions, employers, and three additional references (collectively "contacts").[85] SF 85 also requires the disclosure of any illegal drug use within the past year, including the non-prescribed use of prescription drugs, and "any [related] treatment or counseling received."[86]

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[81] *See generally* Nelson v. NASA, 530 F.3d 865 (9th Cir. 2008). In my informational privacy analysis, I focus on the NACI investigation to which contractor-employees in low-risk or non-sensitive positions must submit for two reasons. *See infra* Part III. First, JPL litigants must submit to this investigation. Moreover, while the breadth of the NACI investigation may increase for employees in more sensitive positions, *see supra* note 78; the government's interest against which the investigation is weighed remains the same: identity verification. *See infra* Part III.B. Thus, if the least searching investigation considered in this article suffers constitutional infirmities, so too do the more searching investigations applied to employee and contractor-employees in positions of increased sensitivity.

[82] FIPS 201, *supra* note 8, at 53. SF 85 provides that completion of the form and disclosure of the requested information is voluntary. SF 85, *supra* note 77, ¶ 2. However, the form further states the failure to disclose the information may affect the applicant's "placement or employment prospect." *Id.*

[83] *Id.* at 1 (questions 1-7).

[84] *Id.* at 2-3 (questions 8-10). If the applicant's most recent education occurred outside of this five year period, the applicant must identify his or her most recent post-high school education history. *Id.* at 2 (question 9).

[85] *Id.* at 2-4 (questions 8-11). For residency information going back three years, the applicant must "list a person who knew [him or her] at that address, and who preferably still lives in that area," excluding the applicant's "spouse, former spouses, or other relatives." *Id.* at 2 (question 8). If an applicant was unemployed or self-employed, the applicant must similarly provide a contact who can confirm this information. *Id.* at 3 (question 10).

As to references, SF 85 requires the applicant "[l]ist three people who know [him or her] well and live in the United States." *Id.* at 4 (question 11). SF 85 contemplates these references will "be good friends, peers, colleagues, college roommates, etc., whose combined association with [the applicant] covers as well as possible the last five years." *Id.* These additional three references cannot be listed elsewhere in SF 85, nor include the applicant's "spouse, former spouses, or other relatives." *Id.*

SF 85 also includes a broad "Authorization for the Release of Information" to which the applicant must consent.[87] The release authorizes the government "to obtain *any information* relating to [the applicant's] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or *other sources of information*."[88] The release expressly describes this information as including, but not limited to, the applicant's "academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information."[89] The release remains valid for two years.[90]

The extent to which the government may use this broad release remains uncertain; however, at a minimum, the release authorizes the submission of investigative request forms to the contacts identified in SF 85 (*i.e.*, landlords, employers, academic institutions, and references) as well as relevant law enforcement agencies. These investigative requests consist of Form 41 sent to employers, Form 42 sent to references and residential contacts, Form 43 sent to academic institutions, and Form 44 sent to relevant law enforcement agencies.[91]

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[86] *Id.* at 5 (question 14). To avoid self-incrimination concerns with respect to the applicant's illegal drug use, the question provides that no information contained in, or "derived from [the] response will be used as evidence against [him or her] in any subsequent criminal proceeding." *Id.* Additionally, SF 85 requests the applicant to disclose information about his or her military and selective service record. *Id.* at 5 (questions 12-13).

[87] *See id.* at 6. This release is part of SF 85. Therefore, it must be completed in order for the applicant to have complied fully with the NACI background investigation requirements. *See supra* note 78 and accompanying text.

[88] SF 85, *supra* note 77, at 6 (emphasis added).

[89] *Id.* This release indicates that certain information (e.g. medical records) may require the government to obtain a separate release form. *Id.* However, this provision fails to limit the scope of the release, as the PIV Standard would also require the applicant to consent to the subsequent release, and failure to do so would mean the applicant failed to complete the NACI investigation. *See supra* notes 78, 81.

[90] SF 85, *supra* note 77, at 6.

[91] *See* U.S. OFFICE OF PERSONNEL MANAGEMENT, INV FORM 41: INVESTIGATIVE REQUEST FOR EMPLOYMENT DATA AND SUPERVISOR INFORMATION (2006) [hereinafter FORM 41]; INV FORM 42: INVESTIGATIVE REQUEST FOR PERSONAL INFORMATION (2005) [hereinafter FORM 42]; INV FORM 43: INVESTIGATIVE REQUEST FOR EDUCATIONAL

Of these four forms, Form 41 and Form 42, sent to employers, references, and residential contacts, contain the most problematic inquiries with respect to informational privacy rights.[92] These two forms broadly request the contact disclose and discuss any information, adverse or otherwise, about the applicant's "abuse of alcohol and/or drugs . . . mental or emotional stability . . . financial integrity . . . general behavior or conduct . . . [or] other matters."[93] In a similarly broad fashion, Form 43 requests the academic institution contact to explain "any adverse information relevant to this [applicant]" contained in the institution's records.[94] All three of these forms request the contact to confirm the information supplied in SF 85,[95] but only Form 41 (for employers) and Form 42 (for landlords and references) further request any "additional information which [the contact] feel[s] may have a bearing on [the applicant's] suitability for government employment or a security clearance."[96] Form 44 (for law enforcement) focuses primarily on the information contained in the applicant's criminal record, if any; this factual reporting does not entail the same sweeping request for character judgment contained in the other forms.[97]

REGISTRAR AND DEAN OF STUDENTS RECORD DATA (2006) [hereinafter FORM 43]; INV FORM 44: INVESTIGATIVE REQUEST FOR LAW ENFORCEMENT DATA (2006) [hereinafter FORM 44].

[92] *See infra* Part III.

[93] FORM 41, *supra* note 91, at 2 (question 5); FORM 42, *supra* note 91, at 2 (question 7). These forms also inquire into the employment and associational relationship between the contact and the applicant, as well as the contact's view of the applicant's trustworthiness. FORM 41, *supra* note 91, at 2 (questions 2-4); FORM 42, *supra* note 91, at 2 (questions 1-4, 6).

[94] FORM 43, *supra* note 91, at 2 (question 2).

[95] FORM 41, *supra* note 91, at 2 (question 1); FORM 42, *supra* note 91, at 2 (question 5), FORM 43, *supra* note 91, at 2 (question 1).

[96] FORM 41, *supra* note 91, at 2 (question 6); FORM 42, *supra* note 91, at 2 (question 8). However, Form 44 does request the law enforcement contact to provide any "additional information that may have a bearing on [the applicant's] eligibility for federal employment, access to classified information or assignment to sensitive national security duties." FORM 44, *supra* note 91, at 2 (question 3).

[97] FORM 44, *supra* note 91, at 2 (questions 1-2). Form 41 and Form 42 also request the employers, residential contacts, and references to disclose any of the applicant's "violations of the law" known to them. FORM 41, *supra* note 91, at 2 (question 5); FORM 42, *supra* note 91, at 2 (question 7).

The investigative request forms (Forms 41-44), together with SF 85 and any additional investigation conducted pursuant to the release, provide the government with the information it cross-references and analyzes to determine if the applicant may receive a PIV Credential. At a minimum, the NACI investigation requires the government to check this information against four assessment matrices or informational databases.[98] Only upon completion of this NACI investigation process will the employee or contractor-employee receive the full PIV Credential necessary to access the federal facilities and information systems required for his or her work.[99]

II. Overview of Informational Privacy Jurisprudence

As with many policies responding to security concerns after September 11, 2001,[100] the PIV Standard's background investigation requirement provokes concerns about intrusions into an individual's privacy. In the context of the non-sensitive JPL contractor-employees seeking to prevent enforcement of the PIV Standard's background investigation, a key question is whether the background investigation deprives these contractor-employees of their constitutional right to informational privacy. The federal government cannot condition the continued (or potential) employment of Dr. Nelson and other federal workers (or applicants) on their submission to an NACI investigation that infringes upon their constitutional right to informational privacy. For reasons discussed below—namely, that the NACI investigations consist of expansive and largely unrestrained inquiries that bear little or no relation to the government's limited interest in identity verification—this Article concludes that the government cannot require non-sensitive contractor-employees, such as those at JPL, to submit to an NACI investigation as a condition of their employment.[101]

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[98] The matrices and databases are as follows: 1) the Security/Suitability Investigations Index; 2) the Defense Clearance and Investigation Index; 3) an FBI Name Check; and 4) an FBI National Criminal History Fingerprint Check. OMB GUIDANCE DOCUMENT, *supra* note 8, at 5 n.5.

[99] A quasi-PIV Credential that is "electronically distinguishable" from a full PIV Credential may be granted to the employee or contractor-employee after he or she completes an FBI National Criminal History Check (i.e. fingerprint check) for use during the pendency of the NACI investigation. *See* FIPS 201, *supra* note 8, at 6.

[100] KLOSEK, *supra* note 2, at 33 ("examining how such attacks and our response thereto (including the legislation passed as a result thereof) have been eroding privacy rights in the United States").

A. Supreme Court Jurisprudence

The Supreme Court has expressly considered the right to informational privacy in only two majority opinions, both decided in 1977:[102] *Whalen v. Roe*[103] and *Nixon v. Administrator of General Services.*[104]

In *Whalen*, the Supreme Court first articulated the two distinct, albeit interrelated, branches of the ever-enigmatic constitutional right to privacy:[105] 1) the privacy right of "avoiding disclosure of personal matters"; and 2) the privacy right of "independence in making certain kinds of important decisions."[106] The Supreme Court derives these two constitutional privacy branches, commonly termed the right to informational privacy and the right to autonomy, respectively,[107] from the liberty interests protected by an amalgamation of constitutional provisions, particularly the Due Process Clauses of the Fifth[108] and Fourteenth[109] Amendments.[110]

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[101] *See, e.g.*, Fraternal Order of Police, Lodge No. 5 v. City of Phila., 812 F.2d 105, 112 (3d Cir. 1987) (analogizing to the First and Fourth Amendment contexts and rejecting notion that government may condition employment upon waiver of the constitutional right to informational privacy).

[102] Helen L. Gilbert, *Minors' Constitutional Right to Informational Privacy*, 74 U. CHI. L. REV. 1375, 1378-79 (2007).

[103] 429 U.S. 589, 598-600 (1977).

[104] 433 U.S. 425, 457 (1977).

[105] Gilbert, *supra* note 102, at 1375 ("The contours of the constitutional right to privacy have eluded courts since the Supreme Court first announced the distinct right in *Griswold v. Connecticut.*").

[106] *Whalen*, 429 U.S. at 598-600.

[107] Gilbert, *supra* note 102, at 1378. The circuit courts interchange the phrase "right to informational privacy" and the "right to confidentiality." *Compare, e.g.*, *In re* Crawford, 194 F.3d 954, 959 (9th Cir. 1999) (right to informational privacy), *with, e.g.*, Doe v. City of N.Y., 15 F.3d 264, 269 (2d Cir. 1994) (right to confidentiality).

[108] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

[109] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

In *Whalen*, the Court found no violation of the patients' informational privacy rights by the acquisition or retention of their prescription records.[111] Here, a New York statute required physicians provide state officials with the names, addresses, and ages of all patients who obtained a prescription for a Schedule II drug.[112] The New York Department of Health retained a hard copy of this list and uploaded it to a centralized computer database.[113] The Court identified a strong countervailing state interest in the administration of prescription drugs to prevent diversion into unlawful markets.[114] Moreover, the Court viewed the risk of a leak of the compiled information as minimal based on the security measures taken to guard against inadvertent or non-consensual disclosures.[115] As to the initial collection of the prescription information (i.e., the disclosure to the Department of Health), the Court found it permissible because such information was regularly interchanged amongst doctors, hospital personnel, insurance companies, and public health agencies.[116] The statute's new disclosure requirement simply made the process more efficient and effective, but did not infringe upon the right to informational privacy.[117]

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[110] *Whalen*, 429 U.S. at 598-99, 598 n.23 (deriving both strands of the "zone of privacy" from the personal liberty interest encompassed in the Due Process Clauses); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (deriving autonomy branch from Due Process Clause's liberty interests and the "concept of ordered liberty" (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); *see also* Francis S. Chlapowski, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 135 (1991).

[111] *Whalen*, 429 U.S. at 603.

[112] *Id.* at 593.

[113] *Id.*

[114] *See id.* at 597-98, 603.

[115] *Id.* at 600-02. These measures included: 1) storage of the physical records in a secure vault, 2) uploading of records to the "computer tapes" only when off-line to prevent outside hackers, 3) storage of "computer tapes" in a locked cabinet, 4) an express statutory prohibition against public disclosure, and 5) destruction of records after five years. *Id.* at 593-94. The Court found "no support in the record, or in the experience of the two States that New York . . . emulated, for an assumption that the security provisions of the statute [would] be administered improperly." *Id.* at 601.

[116] *Id.* at 602.

[117] *See id.* at 593, 602. Nonetheless, the Court recognized the legitimacy of concerns about "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files." *Id.* at 605.

Four months after *Whalen*, the Supreme Court revisited and reaffirmed the existence of the right to informational privacy, but again found no violation.[118] In *Nixon*, former President Nixon challenged, as a violation of his informational privacy rights, the screening process employed by government archivists to differentiate those documents to be returned to him because of their personal nature from those warranting public access and preservation because of their historical value.[119] First, the Court found, despite his public status, President Nixon maintained a legitimate expectation of privacy in certain "'private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends . . . .'"[120] Second, as in *Whalen*, the Court weighed President Nixon's privacy interest "against the public interest in subjecting the Presidential materials . . . to archival screening."[121] The Court found the public interest outweighed President Nixon's privacy interest, particularly given the practical difficulty of extricating only a small number of private documents from a massive amount of public materials without the screening process; moreover, safeguards against unwarranted dissemination of the private documents existed, including the employment of well-respected archivists to perform the screening.[122]

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[118] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457-65 (1977). Although the Court loosely interspersed the informational privacy discussion with its Fourth Amendment privacy discussion, the Court clearly engaged in an informational privacy analysis. *See id.* The Court expressly reaffirmed the existence of the informational privacy right, noting that "[o]ne element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters.'" *Id.* at 457 (quoting *Whalen*, 429 U.S. at 599). Moreover, the Court reasoned that President Nixon's "privacy interest . . . [was] weaker than that found wanting in the recent decision of *Whalen v. Roe*." *Id.* at 458 (internal citation omitted). Thus, the Supreme Court, for a second time, acknowledged the existence of the informational privacy branch of the right to privacy. *See id.* Lower courts have likewise acknowledged the existence of the informational privacy branch. *See, e.g.*, Denius v. Dunlap, 209 F.3d 944, 955 (7th Cir. 2000); Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996); Doe v. City of N.Y., 15 F.3d 264, 267 (2d Cir. 1994); James v. City of Douglas, 941 F.2d 1539, 1543 (11th Cir. 1991); Fraternal Order of Police, Lodge No. 5 v. City of Phila., 812 F.2d 105, 110 (3d Cir. 1987); Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (citing *Nixon*, 433 U.S. at 457-58, for proposition that personal information receives constitutional protection when a legitimate expectation of privacy exists); Taylor v. Best, 746 F.2d 220, 225 (4th Cir. 1984); Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981); *see also* Bruce E. Falby, Case Comment, *A Constitutional Right to Avoid Disclosure of Personal Matter: Perfecting Privacy Analysis in* J.P. v. DeSanti, 71 GEO. L.J. 219, 234 (1982) ("[T]he Supreme Court's . . . decision in *Nixon* . . . reaffirms that *Whalen* recognized a right to nondisclosural privacy. . . . In reaching this conclusion the Court . . . seemed to confuse [F]ourth [A]mendment and [F]ourteenth [A]mendment privacy protection by building on a [F]ourteenth [A]mendment privacy interest to establish a privacy interest protected by the [F]ourth [A]mendment."). Interestingly, the Ninth Circuit has refrained from relying on *Nixon* and instead focused on *Whalen*'s articulation of the two branches of privacy. *See, e.g.*, Tucson Woman's Clinic v. Eden, 379 F.3d 531, 551 (9th Cir. 2004); Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983).

Nonetheless, the First Circuit, which has yet to squarely rule on the scope of the right to informational privacy, *see infra* note 147, and the Sixth Circuit, which has narrowly construed the right to informational privacy, *see infra* note 137, have both read *Nixon* as a purely Fourth Amendment analysis that simply employed the Fourteenth Amendment's informational privacy right to establish President Nixon's legitimate expectation of privacy in certain documents. Borucki v. Ryan, 827 F.2d 836, 844 (1st Cir. 1987) ("[T]hat section of the [*Nixon*] opinion in which the Court cites *Whalen* appears to address the question of whether Mr. Nixon had a 'legitimate expectation of privacy' in the relatively few personal papers among the materials, sufficient to implicate the [F]ourth [A]mendment." (quoting *Nixon*, 433 U.S. at 465)); J.P. v. DeSanti, 653 F.2d 1080, 1089 (6th Cir. 1981) ("The [*Nixon*] Court's cite to *Whalen* was for the apparent purpose of establishing that Mr. Nixon had an expectation of privacy in his papers that entitled him to [F]ourth [A]mendment protection.").

Although the Court found no deprivation of the constitutional right to informational privacy in either *Whalen* or *Nixon*, in both decisions the Court explicitly recognized that individuals possess a constitutionally protected interest in avoiding the disclosure of information to the public.[123] We can take several lessons from *Whalen* and *Nixon* regarding the scope this interest. First, the right to informational privacy protects an individual against the collection of personal information by the government as well as subsequent disclosure of that information.[124] Second, an individual's disclosure of personal information to a third party does *not* destroy an individual's interest in the protection of that information from government collection or dissemination.[125] The context of that disclosure, however, is significant. For example, an individual, such as the President in *Nixon*, will retain a legitimate expectation of privacy in certain "private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends,"[126] but may not retain an expectation of privacy in information routinely and regularly disclosed to numerous third parties, such as in *Whalen.*[127]

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[119] *Nixon*, 433 U.S. at 425-26, 455-57.

[120] *Id.* at 457, 459 (quoting Nixon v. Adm'r of Gen. Servs., 408 F. Supp. 321, 359 (D.D.C. 1976), *aff'd*, 433 U.S. 425 (1977)).

[121] *Id.* at 458.

[122] *Id.* at 456-57, 462-65.

[123] *Whalen*, 429 U.S. at 598-600; *see Nixon*, 433 U.S. at 455-57.

[124] *See Whalen*, 429 U.S. at 602 ("Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not *automatically* amount to an impermissible invasion of privacy." (emphasis added)). This statement implies that initial disclosures under other circumstances may impinge upon the right to privacy, but does not where the individual has a minimal interest in privacy and the government has a strong interest in disclosure. *See id.*

Additionally, while the Court failed to articulate a clear framework for analyzing information privacy rights, it did provide several guideposts. In both cases, the Court weighed the government's interest in collection or dissemination of the information against the individual's interest in protecting his privacy.[128] In undertaking this balancing inquiry, the Court also identified several factors to consider that may bolster or weaken the government's or individual's interest: (1) the nature of the information collected or disseminated—the more commonly this information is disclosed by the individual, the weaker the individual's interest in protecting his or her privacy;[129] (2) the scope of the information collected in comparison to the scope of information in which the individual has a privacy interest;[130] (3) the existence of safeguards to protect against the unauthorized dissemination of the collected information will weigh in favor of the government;[131] and (4) the availability of practical alternative means of achieving the government's purpose in collecting or disseminating the information.[132]

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[125] *Id.*

[126] *See Nixon*, 433 U.S. at 455-57, 459.

[127] *Whalen*, 429 U.S. at 602.

[128] *Nixon*, 433 U.S. at 458 ("[A]ny intrusion [of privacy] must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening."); *see Whalen*, 429 U.S. at 597-98, 602-03 (considering the strength of New York's interest in collecting the information).

[129] *Whalen*, 429 U.S. at 602; *Nixon*, 433 U.S. at 455-57.

[130] *Nixon*, 433 U.S. at 460 ("The fact that appellant may assert his privacy claim as to only a small fraction of the materials of his Presidency is plainly relevant in judging the reasonableness of the screening process . . . .").

[131] *Whalen*, 429 U.S. at 589, 593-95; *Nixon*, 433 U.S. at 456-57, 463-65.

B. *Parsing the Rule from Whalen & Nixon: The Circuit Split*

Despite the guideposts set forth in *Whalen* and *Nixon*, the circuit courts have struggled to breathe life into this doctrine in a consistent manner. The circuit courts share the same basic analyses set forth in *Whalen* and *Nixon*: (1) determining if an individual's privacy interest is implicated by the collection or dissemination of information; and (2) if so, weighing the governmental interest in collection or dissemination of that information against the individual interests in avoiding disclosure.[133] In each of these steps, however, the circuit courts have struggled to develop uniform jurisprudence. As to the first step, the courts frequently disagree on when the collection or dissemination of information implicates the constitutional right to informational privacy, i.e. they disagree on the type of information that is protected by the informational privacy right.[134] On the second step, the circuit courts diverge with respect to the level of judicial scrutiny they employ in balancing the interests at stake.[135] These disagreements, however, are a matter of degree: only the D.C. Circuit has declined to give any life to the right to informational privacy.[136]

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[132] *Nixon*, 433 U.S. at 465 (noting the "virtual impossibility of segregating the small quantity of private materials without comprehensive screening").

[133] Gilbert, *supra* note 102, at 1375, 1381-88 ("These courts have created a conceptually diverse but relatively stable framework for evaluating informational privacy claims.").

[134] *Id.* at 1382-83, 1385.

[135] *Id.* at 1385-86.

[136] *Id.* at 1381. *Compare* Am. Fed'n of Gov't Employees, AFL-CIO v. Dep't of Hous. & Urban Dev., 118 F.3d 786, 791 (D.C. Cir. 1997) ("We begin our analysis by expressing our grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information."), *with, e.g.*, Bloch v. Ribar, 156 F.3d 673, 684-86 (6th Cir. 1998) ("[A] constitutional right to nondisclosure of certain types of private information exists . . . ."), Vega-Rodriguez v. P.R. Tel. Co., 110 F.3d 174, 183 (1st Cir. 1997) (acknowledging the possibility of a right of confidentiality that narrowly extends beyond the right of autonomy), Alexander v. Peffer, 993 F.2d 1348, 1349-51 (8th Cir. 1993) (evaluating the constitutional right of privacy in information disclosed), James v. City of Douglas, 941 F.2d 1539, 1543 & n.7 (11th Cir. 1991) (adopting as binding precedent the Fifth Circuit's interpretation of a constitutional right to privacy that

1. Defining Protected Personal Information

The circuit courts that recognize a constitutional right to informational privacy have taken three different approaches to identifying which types of personal information warrant constitutional protection. The Sixth Circuit affords the least constitutional protection to information, with the First and Eighth Circuits largely endorsing the Sixth Circuit's approach.[137] These circuits find the information constitutionally protected only if the personal information implicates a fundamental right, such as procreation.[138] Led by the Third Circuit (although it appears to be shifting towards the narrow approach of the First, Sixth, and Eighth Circuits),[139] the remaining circuits, with the exception of the Ninth Circuit and the D.C. Circuit, find information protected if the individual has a "legitimate expectation" or "reasonable expectation" of privacy in that information.[140] The Ninth Circuit has not adopted either approach and, instead, employs an ad hoc analysis; however, its case law suggests its approach hews closely to that of the Third Circuit's reasonable

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included an individual's interest in avoiding disclosure of personal matters), Pesce v. J. Sterling Morton High Sch., 830 F.2d 789, 797 (7th Cir. 1987) ("We recognize that the federal right of confidentiality might in some circumstances be implicated when a state conditions continued employment on the disclosure of private information."), Taylor v. Best, 746 F.2d 220, 225 (4th Cir. 1984) ("The right to privacy includes . . . an 'individual interest in avoiding disclosure of personal matters.'" (quoting Whalen v. Roe, 429 U.S. 589, 599 (1977))), Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) ("The [C]onstitution protects two kinds of privacy interests."), Barry v. City of N.Y., 712 F.2d 1554, 1557 (2d Cir. 1983) (recognizing the constitutional right to informational privacy), Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 435 (10th Cir. 1981) (acknowledging a right to prevent disclosure of personal matters), United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (recognizing the two types of privacy interests), *and* Plante v. Gonzalez, 575 F.2d 1119, 1127-28 (5th Cir. 1978) ("We shall consider . . . the interest in avoiding disclosure, or confidentiality.").

[137] Gilbert, *supra* note 102, at 1382-83. Although this article has placed the Eighth Circuit as more in line with the First and Sixth Circuits because of its language and decisions that suggest an affinity to the circuits recognizing a narrow right to informational privacy, *see infra* notes 148-50 and accompanying text, Gilbert quite reasonably categorized the Eighth Circuit with the majority of circuits that protect information in which a person has a reasonable expectation of privacy, *see* Gilbert, *supra* note 102, at 1382-83; *see also infra* note 150.

[138] *See infra* Part II.B.1.a.

[139] *See infra* note 152.

[140] Gilbert, *supra* note 102, at 1382.

expectation analysis.[141] As the D.C. Circuit continues to deny the existence of a constitutional right to informational privacy, it has not articulated an approach to identifying what types of information warrant constitutional protection.[142]

a. Information that Implicates Fundamental Rights Approach

The First, Sixth, and Eighth Circuits have adopted the narrowest view of what information is constitutionally protected. The Sixth Circuit initially questioned whether a constitutional right to informational privacy even existed,[143] but it ultimately relied on *Whalen v. Roe* coupled with *Paul v. Davis* to conclude that (a) such a right exists, but (b) that right protects against the collection or disclosure of information only if that information implicates a fundamental right.[144] These fundamental rights include "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education," (i.e., fundamental rights under *Paul v. Davis* and its progeny).[145] As the Sixth Circuit has summarized the informational privacy right, then, the right is triggered upon collection or dissemination of "personal information [that] could lead to bodily harm" or information that is "of a sexual, personal, and humiliating nature."[146] The First Circuit has expressed a "sympathetic" view towards the Sixth Circuit's narrow definition, but has yet squarely to adopt it.[147]

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[141] *See infra* Part II.B.1.c.

[142] *See* Am. Fed'n of Gov't Employees, AFL-CIO v. Dep't of Hous. & Urban Dev., 118 F.3d 786, 791 (D.C. Cir. 1997) ("We begin our analysis by expressing our grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information.").

[143] J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981) (finding no *general* right to nondisclosure and asserting the following: "[O]f the cases cited holding that there is a constitutional right to nondisclosure of private information, none cites a constitutional provision in support of its holding. It is understandable, though rare, to fail to cite a supporting provision of the Constitution when one is dealing with such well-established rights as those in the [F]irst or [F]ourth [A]mendments. It is quite a telling failure when the constitutional right at issue is not well-established.").

[144] *Cf. In re* Zuniga, 714 F.2d 632, 642 (6th Cir. 1983) (acknowledging that the disclosure of psychiatric patients' names and treatments constitutes at least a "slight intrusion on the patients' privacy interests"). *Compare* Jarvis v. Wellman, 52 F.3d 125, 126 (6th Cir. 1995) (finding disclosure of medical records failed to implicate triggering of fundamental rights), Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994) (finding disclosure of inmate's HIV status failed to implicate triggering of any fundamental right), *and DeSanti*, 653 F.2d at 1089-90 ("The interest asserted by appellant . . . in nondisclosure of juvenile court records . . . is far afield from those privacy rights that are fundamental or implicit in the concept of ordered liberty." (internal quotation marks omitted)), *with* Bloch v. Ribar, 156 F.3d 673, 686 (6th Cir. 1998) (finding rape victim's interest in nondisclosure of "intimate details of the rape" triggered a fundamental right), *and* Kallstrom v. City of Columbus, 136 F.3d 1055, 1061-62 (6th Cir. 1998) (finding disclosure of personal files of undercover police officers to defense counsel representing violent gangs implicated triggering fundamental rights, such as personal security, bodily integrity, and life).

The Eighth Circuit also employs a narrow approach. It protects personal information only where that information relates "to highly personal matters representing 'the most intimate aspects of human affairs,'" and the disclosure of that information results in "either a shocking degradation or an egregious humiliation of [the individual]" or otherwise implicates fundamental rights.[148] The Eighth Circuit, therefore, may well protect more information than the First and Sixth Circuits,[149] but it is still far less expansive in its protection than the circuits employing the reasonable expectation of privacy approach.[150]

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[145] Paul v. Davis, 424 U.S. 693, 713 (1976). These courts have limited the scope of protected personal information because of the deficiency of Supreme Court guidance, the anxiety about the risk of judicial encroachment on states and Congress to enforce a right as "vague, undefinable [sic], and all-encompassing as individual privacy," as well as an unfavorable view of recognizing rights not expressly delineated in the Constitution. *See, e.g.*, *DeSanti*, 653 F.2d at 1089-90. However, as other commentators have already concluded, at a minimum, these circuits' reliance on *Paul v. Davis* is "misplaced." *See, e.g.*, Chlapowski, *supra* note 110, at 149; Gilbert, *supra* note 102, at 1379 n.35, 1380.

[146] Lambert v. Hartman, 517 F.3d 433, 440-46 (6th Cir. 2008) (citations omitted) (rejecting argument that disclosure of Social Security Number triggered informational privacy analysis because the plaintiff showed only a risk of financial injury, not a risk of impairing a fundamental right).

[147] Gilbert, *supra* note 102, at 1382 n.47; *see also* Vega-Rodriguez v. P.R. Tel. Co., 110 F.3d 174, 182-83 (1st Cir. 1997) (reading Borucki v. Ryan, 827 F.2d 836 (1st Cir. 1987), as suggesting the constitutional right to confidentiality is likely limited to "information relating to matters within the scope of the right to autonomy" - i.e., fundamental rights - and at most extends to "profligate disclosure of medical, financial, and other intimately personal data").

[148] Eagle v. Morgan, 88 F.3d 620, 625-27 (8th Cir. 1996) (quoting Wade v. Goodwin, 843 F.2d 1150, 1153 (8th Cir. 1988) and Alexander v. Peffer, 993 F.2d 1348, 1350 (8th Cir. 1993)); *see also* Cooksey v. Boyer, 289 F.3d 513, 516 (8th Cir. 2002) (finding disclosure of high ranking law enforcement officer's psychological treatment for stress not to constitute such degradation and humiliation and noting the common knowledge of the stress corresponding to such a position). *Cf. In re Zuniga*, 714 F.2d at 642 (acknowledging that the disclosure of psychiatric patients' names and treatments constitutes at least a "slight intrusion on the patients' privacy interests").

b. Reasonable Expectation of Privacy Approach

The majority of circuit courts have adopted a more protective "reasonable expectation" analysis.[151] In these courts, personal information receives informational privacy protection if an individual has a legitimate expectation of privacy in the information in question.[152] The reasonableness of an individual expectation of privacy will often turn on the nature of the information and the extent to which the individual would customarily disclose such information.[153] Professor Raymond Wacks'

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[149] *See, e.g.*, *Alexander*, 993 F.2d at 1349-51 (finding disclosure of an individual's failure to qualify as a police officer insufficient to trigger informational privacy protection as it "neither involved matters deemed to be fundamental rights *nor addressed highly personal medical or financial information*" (emphasis added)).

[150] At times the Eighth Circuit has used the "legitimate expectation" of privacy language, *see, e.g.*, *Eagle*, 88 F.3d at 625, but requirements that the disclosure of such information be of a shockingly degrading nature narrows the scope of information in which an individual will have a reasonable expectation of privacy. *See id.* at 625-27 (finding insufficient expectation of privacy in criminal history contained in the public record to trigger informational privacy protection because disclosure of such information did not result in shocking degradation). Thus, while a circuit court employing a reasonable expectations analysis would likely find information protected where its disclosure would have resulted in shocking degradation, *see* Nunez v. Pachman, 578 F.3d 228, 231-32 & n.8 (3d Cir. 2009) (citing with approval *Eagle*, 88 F.3d at 625, in its discussion of the type of information in which an individual has a reasonable expectation of privacy), an individual may well have a legitimate expectation of privacy even where the disclosure of the information would not result in shocking degradation, *see, e.g.*, Sheets v. Salt Lake County, 45 F.3d 1383, 1388 (10th Cir. 1995) (recognizing right to confidentially generally protects matters concerning "marriage, finances, and business"). Courts have regularly considered how intimate the information was in determining whether the individual has a reasonable expectation of privacy, *see, e.g.*, Doe v. Se. Pa. Transp. Auth., 72 F.3d 1133, 1138 (3d Cir. 1995), but requiring a "shocking degradation" goes beyond the requirement of intimacy. The disclosure of intimate information, such as a medical record showing someone has unavoidably inherited a common disease may not result in the same degradation that would follow from the disclosure of test results showing he has AIDS and indicating he likely contracted the HIV virus through promiscuous and unsafe sexual practices; however, an individual would expect that both results would "customarily remain private." *See id.*

[151] *See* Gilbert, *supra* note 102, at 1382.

[152] *E.g.*, Denius v. Dunlap, 209 F.3d 944, 957 (7th Cir. 2000) ("reasonable expectation"); Se. Pa.Transp. Auth., 72 F.3d at 1138; Doe v. City of N.Y., 15 F.3d 264, 269 (2d Cir. 1994) (finding a "right to privacy (or confidentiality) in [one's] HIV status . . . because [one's] personal medical condition is a matter that [one] is normally entitled to

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keep private"); James v. City of Douglas, 941 F.2d 1539, 1543 n.7 (11th Cir. 1991) (noting the Eleventh Circuit's adoption "as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981," which included the 1978 *Plante* decision that employed a "legitimate expectation" standard); Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990) ("Personal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy."); Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) ("Information is constitutionally protected when a legitimate expectation exists that it will remain confidential . . . ."); Plante v. Gonzalez, 575 F.2d 1119, 1133, 1135 (5th Cir. 1978) ("legitimate expectation"). These cases frequently rely on *Nixon* or a comparison to Fourth Amendment standards as the source of the reasonable expectation analysis. *See, e.g.*, *Mangels*, 789 F.2d at 839. As the Ninth Circuit remains the only circuit court fully recognizing a right to informational privacy, but doing so in sole reliance on *Whalen* and with no reference to *Nixon*, *see supra* note 118; it is fitting that the Ninth Circuit has taken a more ad hoc approach by failing to explicitly reference the "reasonable expectation" analysis. *See, e.g.*, *In re* Crawford, 194 F.3d 954, 958-60 (9th Cir. 1999). Nonetheless, the Ninth Circuit's frequent use of the precedents of the sister circuits employing the reasonable expectation standard renders the Ninth Circuit's ad hoc approach comparable to the reasonable expectation approach. *See, e.g.*, Doe v. Att'y Gen. of U.S., 941 F.2d 780, 795-96 (favorably comparing the personal information protection recognized by the Third Circuit).

In a recent case, the Third Circuit appears to have attempted to shift its "legitimate expectations" analysis closer to the "fundamental rights" analysis and "shocking degradation in disclosure" analysis engaged in by the First, Sixth, and Eighth Circuits. *See Nunez*, 578 F.3d at 231-32. In *Nunez*, the Third Circuit addressed the informational privacy right without focusing on the ample Third Circuit case law that considers whether an individual holds a reasonable expectation of privacy in the information, *see, e.g.*, *Se. Pa. Transp. Auth.*, 72 F.3d at 1138; United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980). *Nunez*, 578 F.3d at 231-32. Instead, the court cited with approval to the Eighth Circuit's more narrow language about the type of information protected by the constitutional right to informational privacy, and it also plucked equally restrictive language from a Tenth Circuit decision. *Nunez*, 578 F.3d at 231-32 (citing *Eagle*, 88 F.3d at 625, and *Mangels*, 789 F.2d at 839). *But see Mangels*, 789 F.2d at 839 (going on to explain that "[i]nformation is constitutionally protected when a legitimate expectation exists that it will remain confidential" and "[t]he legitimacy of an individual's expectations depends, at least in part, upon the intimate or otherwise personal nature of the material which the state possesses" (citing with approval *Westinghouse Elec. Corp.*, 638 F.2d at 577 as protecting medical records)).

[153] *See, e.g.*, *Westinghouse Elec. Corp.*, 638 F.2d at 577 n.5 ("Privacy, thus, is control over knowledge about oneself. But it is not simply control over the quantity of information abroad; there are modulations in the quality of the knowledge as well. We may not mind that a person knows a general fact about us, and yet feel our privacy invaded if he knows the details. For instance, a casual acquaintance may comfortably know that I am sick, but it would violate my privacy if he knew the nature of the ill-

definition of personal information is particularly instructive and encompasses the general considerations a court uses to ascertain the reasonableness of one's expectation: "Personal information consists of those facts, communications, or opinions which relate to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold *or at least restrict* their collection, use, or circulation."[154] Unlike in the Fourth Amendment context, a disclosure of information to a third party will not necessarily destroy an individual's legitimate expectation of privacy in that information.[155] Under this majority approach,

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ness. Or a good friend may know what particular illness I am suffering from, but it would violate my privacy if he were actually to witness my suffering from some symptom which he must know is associated with the disease." (quoting Charles Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968))).

[154] RAYMOND WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW 26 (1989) (emphasis added) (internal quotation marks omitted); *see also Westinghouse Elec. Corp.*, 638 F.2d at 577 & n.5 (finding right to informational privacy triggered by the collection or dissemination of medical records because "[i]nformation about one's body and state of health is matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life" (internal quotation marks omitted), and further citing with approval to a definition of privacy that takes into account different levels of disclosure to third parties).

[155] The Ninth Circuit, which employs an approach comparable to the reasonable expectations analysis, *see supra* Part II.B.1.c, recently touched on this important distinction between the right to informational privacy and the Fourth Amendment protection against search and seizure:

> The constitutional right to informational privacy is concerned with "the individual interest in avoiding disclosure of personal matters." In determining whether the right applies, our cases have emphasized the *nature* of the information sought—in particular, whether it is sufficiently "personal" to merit protection . . . rather than on the manner in which the information is sought. The highly personal information that the government seeks to uncover through the [inquiries to third parties] is protected by the right to privacy, whether it is obtained from third parties or from the applicant directly.
>
> In this respect, the right to informational privacy differs from the Fourth Amendment, which, as a bright-line rule, does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities. This principal has occasionally been rephrased as a general holding that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. We think it is clear, however, that the "legitimate expectation of privacy" described in this context is a term of art used only to define a "search" under the Fourth Amendment, and [the Supreme Court's Fourth Amendment cases on what constitutes a "search"] do

the circuit courts have found four general, at times overlapping,[156] categories of personal information that warrant constitutional informational privacy protection, some of which also implicate fundamental rights:[157] 1) medical information,[158] such as medical conditions or diagnoses,[159] medical treatments or

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> not preclude an *informational privacy* challenge to government questioning of third parties about highly personal matters. If the constitutional right to informational privacy were limited to cases that involved a Fourth Amendment "search," the two rights would be entirely redundant. Indeed, although the two doctrines often overlap . . . we have repeatedly found the right to informational privacy implicated in contexts that did not involve a Fourth Amendment "search."

Nelson v. NASA, 530 F.3d 865, 880 n.5 (9th Cir. 2008) (citations and some internal quotation marks omitted).

[156] Where appropriate, I have identified cases as pertaining to multiple categories. *See infra* notes 158-66.

[157] I derive this polychotomy, in part, from another commentator that identified the general categories of protection as medical information, financial information, sexual information, "and other personal information, such as social security numbers." Gilbert, *supra* note 102, at 1382-83.

[158] *See, e.g.*, O'Connor v. Pierson, 426 F.3d 187, 201 (2d Cir. 2005) ("Medical information in general . . . is information of the most intimate kind."); Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1269 (9th Cir. 1998) (finding nonconsensual retrieval of sensitive medical information about government employees triggered both informational privacy and fourth amendment analyses); *Westinghouse Elec. Corp.*, 638 F.2d at 577 ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to [informational] privacy protection. Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the private enclave . . . ." (internal quotation marks omitted)).

The Seventh Circuit recently found even the requirement of an authorization providing "for the release of medical records or communications" triggers the right to informational privacy. Denius v. Dunlap, 209 F.3d 944, 956-57 (7th Cir. 2000).

[159] *See, e.g.*, Doe v. Delie, 257 F.3d 309, 317 (3d Cir. 2001) (confidentiality in inmate's HIV status); Gruenke v. Seip, 225 F.3d 290, 290, 302-03 (3d Cir. 2000) (confidentiality in pregnancy test result of minor-student); Roe v. Sherry, 91 F.3d 1270, 1274 (9th Cir. 1996) (disclosure of Navy officer's HIV test results triggered informational privacy analysis); Doe v. City of N.Y., 15 F.3d 264, 267 (2d Cir. 1994) (confidentiality in one's HIV status); Doe v. Att'y Gen. of U.S., 941 F.2d 780, 795-96 (9th Cir. 1991) (finding physician to hold confidentiality interest in his own HIV or AIDS status); Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990) (confidentiality in AIDS status); Fraternal Order of Police, Lodge No. 5 v. City of Phila., 812 F.2d 105, 112-13 (3d Cir. 1987) (deeming inquiries into a government applicant's "physical defects or disabilit[ies]" to trigger informational privacy).

drug regimens,[160] psychological treatment or therapy,[161] and substance abuse treatment;[162] 2) financial information,[163] such as asset and debt information;[164] 3) sexual information, such as sexual orientation or activity;[165] and 4) certain private behavioral information.[166] Because *Nixon* and *Whalen* both addressed the individual's expectation of privacy in the information without any discussion of whether it implicates fundamental rights, this approach more closely traces the Supreme Court's analysis.

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[160] *See, e.g.*, Powell v. Schriver, 175 F.3d 107, 111-12 (2d Cir. 1999) (finding post-operative transsexuals maintained right of "confidentiality of one's transsexualism"); Doe v. Se. Pa. Transp. Auth., 72 F.3d 1133, 1138 (3d Cir. 1995) (confidentiality in receipt and use of prescription drugs); *Fraternal Order of Police, Lodge No. 5*, 812 F.2d at 112-13 (deeming inquiries into a government applicant's use of prescription drugs to trigger informational privacy).

[161] *O'Connor*, 426 F.3d at 201 (confidentiality in psychological health information); *Fraternal Order of Police, Lodge No. 5*, 812 F.2d at 112-13 (deeming inquiries into a government applicant's history of psychological observation or treatment to trigger informational privacy).

[162] *O'Connor*, 426 F.3d at 201 ("[I]nformation about a person's . . . substance abuse history in particular, is information of the most intimate kind.").

[163] *See, e.g.*, Sheets v. Salt Lake County, 45 F.3d 1383, 1388 (10th Cir. 1995) (recognizing right to confidentiality protects matters concerning "marriage, finances, and business"); James v. City of Douglas, 941 F.2d 1539, 1543 n.7 (11th Cir. 1991) (noting the Eleventh Circuit's adoption "as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981," which would include the 1978 *Plante* decision that recognized a privacy interest in confidential financial information); Barry v. City of N.Y., 712 F.2d 1554, 1561 (2d Cir. 1983) ("We recognize that public disclosure of financial information may be personally embarrassing and highly intrusive."); Plante v. Gonzalez, 575 F.2d 1119, 1135-36 (5th Cir. 1978) (finding a "substantial" privacy interest in financial information, as "[f]inancial privacy is a matter of serious concern, deserving strong protection").

The Seventh Circuit has found that even though a party may not be able to identify specific financial information warranting constitutional protection, a required authorization providing "for the release of a virtually limitless range of confidential financial information," and lacking safeguards against abuse and subsequent disclosure triggered informational privacy protection. *Denius*, 209 F.3d at 958.

[164] *E.g.*, *In re* McVane, 44 F.3d 1127, 1136 & n.2, 1137 (2d Cir. 1995) (finding subpoena seeking personal financial records of family members of the investigation's targets warranted informational privacy protection); Walls v. City of Petersburg, 895 F.2d 188, 190, 194 (4th Cir. 1990) (finding confidentiality triggered by government employee background investigation question requesting candidate to "[l]ist all outstanding debts or judgments against you or your spouse or for which you are the co-maker"); *Fraternal Order of Police, Lodge No. 5*, 812 F.2d at 114-15 (finding government employee questionnaire inquiring about loans, debts, and income derived from, among other things, salary, wages, fees, investments, property, and gifts, triggers informational privacy analysis); Duplantier v. United States, 606 F.2d 654, 657, 659, 670 (5th Cir. 1979) (finding requirement that federal judges disclose financial reports detailing assets, income, and liabilities of themselves as well as those of spouses or dependent children triggered informational privacy analysis).

[165] *See, e.g.*, C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 180 (3d Cir. 2005) (questionnaire soliciting response to inquiries about one's "intimate and private" sexual

c. *The Ninth Circuit's Ad Hoc Approach*

The Ninth Circuit has never adopted the "reasonable expectation" approach to determining the type of personal information that warrants constitutional protection; instead, it employs an ad hoc approach.[167] Despite the different approach,

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activity may trigger informational privacy analysis (quoting the district court, C.N. *ex rel.* J.N. v. Ridgewood Bd. of Educ., 319 F. Supp. 2d 483, 495 (D.N.J. 2004) (internal quotation marks omitted))); Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000) (finding difficulty in "imagin[ing] a more private matter than one's sexuality" and concluding sexual orientation to constitute "an intimate aspect of [one's] personality" that triggers right to informational privacy); Gruenke v. Seip, 225 F.3d 290, 302-03 (3d Cir. 2000) (confidentiality in pregnancy test result of minor student); *Powell*, 175 F.3d at 111-12 (finding postoperative transsexuals maintained right of confidentiality in transsexualism); Eastwood v. Dep't of Corr. of Okla., 846 F.2d 627, 631 (10th Cir. 1988) (finding questioning of government employee about "irrelevant and embarrassing" topics such as employee's promiscuity triggered right to informational privacy); Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) (finding questioning of government employee about sex life and sexual history triggered right to confidentiality). *But cf.* Fugate v. Phoenix Civil Serv. Bd., 791 F.2d 736, 741 (9th Cir. 1986) (rejecting, in the context of the autonomy branch, extension of *Thorne* to "sexual behavior that is not purely private," and may undermine significant government interests).

Moreover, even the circuit courts taking a narrow view of protected personal information recognize sexual information triggers the right to confidentiality insofar as such information implicates, as it often does, fundamental rights such as contraception, abortion, marriage, and family life. *See, e.g.*, Bloch v. Ribar, 156 F.3d 673, 685-86 (6th Cir. 1998); *see also supra* text accompanying note 145.

[166] *See, e.g.*, *Ridgewood Bd. of Educ.*, 430 F.3d at 180 (questionnaire on drug and alcohol use may trigger informational privacy analysis); *Sheets*, 45 F.3d at 1388 (finding husband to hold reasonable expectation of privacy in deceased wife's diary containing information about their marital relationship); *Fraternal Order of Police, Lodge No. 5*, 812 F.2d at 116 (finding questions about employee's gambling and consumption of alcohol inquired into protected personal information to the extent the questions request disclosure of information about "private drinking habits and more secretive gambling, such as in a small group game").

[167] The Ninth Circuit has consistently relied on *Whalen*, without any reference to *Nixon*, to recognize a right to informational privacy. *See, e.g.*, Nelson v. NASA, 530 F.3d 865, 877 (9th Cir. 2008) (citing Doe v. Att'y Gen. of U.S., 941 F.2d 780, 796 (9th

however, the Ninth Circuit has consistently found the same types of information protected that the circuits employing the "reasonable expectation" analysis have found protected—namely, medical information,[168] financial information,[169] and sexual information.[170] The similarity between the Ninth Circuit's ad hoc approach and the "reasonable expectation" approach is reinforced by the Ninth Circuit's willingness to look for guidance to the circuits employing the "reasonable expectation" approach.[171]

2. Identifying the Level of Judicial Scrutiny

The determination that the information collected or disseminated by the government encompasses constitutionally protected information is only an initial threshold determination. As the Ninth Circuit has aptly put it, this "privacy protection . . . is not absolute . . . ."[172] Instead, a court must weigh the countervailing governmental interests against the individual's

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Cir. 1991), which cites United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980), which in turn relies on *Whalen*); *In re* Crawford, 194 F.3d 954, 958-60 (9th Cir. 1999). Since the "reasonable expectations" analysis is derived from *Nixon*, *see supra* notes 118 and 152, it makes sense that the Ninth Circuit would eschew that approach and adopt the more free-form approach of *Whalen*.

[168] *See* Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1269 (9th Cir. 1998) (finding nonconsensual retrieval of sensitive medical information about government employees triggered both informational privacy and fourth amendment analyses); Roe v. Sherry, 91 F.3d 1270, 1274 (9th Cir. 1996) (disclosure of Navy officer's HIV test results triggered informational privacy analysis).

[169] *See In re Crawford*, 194 F.3d at 958 (agreeing the disclosure of social security numbers, at least if accompanied by names and addresses, may trigger right to informational privacy because of potential for resulting financial harm); *see also Nelson*, 530 F.3d at 877 (characterizing *In re Crawford* as holding that an individual has a constitutionally protected interest in avoiding the disclosure of "financial matters").

[170] *See Thorne*, 726 F.2d at 468 (finding questioning of government employee about sex life and sexual history triggered right to confidentiality). *But cf. Fugate*, 791 F.2d at 741 (rejecting, in the context of the autonomy branch, extension of *Thorne* to sexual behavior that is "not purely private" and may undermine significant government interests).

[171] *See, e.g.*, *Doe*, 941 F.2d at 795-96 (favorably comparing the personal information protection recognized by Third Circuit).

[172] *Roe*, 91 F.3d at 1274 (quoting *Doe*, 941 F.2d at 796); *see also* Gilbert, *supra* note 102, at 1385 ("All circuits recognizing informational privacy hold that this right is not absolute . . . .").

privacy interest in the information, considering, where relevant, additional probative factors that may tip the balance to one side or the other.[173]

If a court finds that the collection or dissemination of the personal information implicates a fundamental right, as always required by the Sixth Circuit,[174] it employs a strict scrutiny analysis.[175] Thus, the government may impinge upon the individual's privacy interest only if the government's collection or dissemination of the personal information furthers a compelling government interest and its action is narrowly tailored to meet that interest.[176]

Most circuit courts, however, have adopted a less stringent balancing test comparable to the analyses employed in *Whalen* and *Nixon*.[177] Commentators and courts view this approach as a somewhat amorphous "form of intermediate scrutiny, requiring the government to show a 'substantial' interest for invading individuals' right to confidentiality . . . ."[178] As part of this balancing process, the circuit courts often invoke all or portions of a non-exhaustive list of potentially probative factors delineated by the Third Circuit:[179] 1) the type of information contained in the requested record; 2) "the potential for harm in any subsequent nonconsensual disclosure," including harm "to the relationship in which the record was generated"; 3) "the adequacy of safeguards to prevent unauthorized disclosure"; 4) "the degree of need for access"; and 5) "whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access."[180] Many of these factors are drawn directly from *Whalen* and *Nixon* as is the balancing approach; thus, at least where fundamental rights are not implicated, this balancing approach more closely parallels *Whalen* and *Nixon* than a strict scrutiny approach.[181]

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[173] Gilbert, *supra* note 102, at 1385-86.

[174] *See supra* note 144 and accompanying text.

[175] *See, e.g.*, Bloch v. Ribar, 156 F.3d 673, 686 (6th Cir. 1998) ("Where state action infringes upon a fundamental right, such action will be upheld under the substantive due process component of the Fourteenth Amendment only where the governmental action furthers a compelling state interest." (quoting Kallstrom v. City of Columbus, 136 F.3d 1055, 1064 (6th Cir. 1998))); *see also* Gilbert, *supra* note 102, at 1386.

[176] *See, e.g.*, *Kallstrom*, 136 F.3d at 1064; Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (requiring disclosure to "advance a compelling state interest which, in addition, must be accomplished in the least intrusive manner"); *see also* Gilbert, *supra* note 102, at 1386.

[177] *See supra* Part II.A.

[178] Gilbert, *supra* note 102, at 1386 & n.87 (compiling cases). Gilbert properly points out that the Ninth Circuit has made its balancing test slightly more protective of privacy by imposing a "narrowly tailored" requirement. *Id.* at 1386 n.87 (quoting *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999)).

[179] Denius v. Dunlap, 209 F.3d 944, 956 n.7 (7th Cir. 2000) ("A number of our sister circuits have adopted a variation of the balancing test articulated by the Third Circuit . . . .").

The Ninth Circuit employs a form of intermediate scrutiny. In the Ninth Circuit, the government "has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest."[182] This language suggests that the Ninth Circuit employs a higher level of scrutiny than the Third Circuit.[183] In some ways, however, the Ninth Circuit seems to perceive itself as employing the same level of scrutiny as the Third Circuit; it has characterized its intermediate scrutiny approach as requiring the same balancing of factors as required by the Third Circuit.[184] While the Third Circuit's approach requires consideration of the government's need for information, which often involves a consideration of the tailoring of the government's action,[185] the Ninth Circuit's articulation of its level of scrutiny, as well as its application, suggests its approach is indeed stricter than that of the Third Circuit.[186]

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[180] United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980).

[181] *See* Gilbert, *supra* note 102, at 1387 (asserting the Third Circuit's approach "may best track the Supreme Court's balancing of factors in both *Whalen* and *Nixon*").

[182] *See In re Crawford*, 194 F.3d at 959 (internal quotation marks omitted) (quoting Doe v. Att'y Gen. of U.S., 941 F.2d 780, 796 (9th Cir. 1991)); *see also* Nelson v. NASA, 530 F.3d 865, 877 (9th Cir. 2008) ("If the government's actions compel disclosure of private information, it 'has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." (quoting *In re Crawford*, 194 F.3d at 959)).

[183] Gilbert, *supra* note 102, at 1386 n.87 (quoting *In re Crawford*, 194 F.3d at 959).

[184] *See Doe*, 941 F.2d at 796 (citing *Westinghouse*, 638 F.2d at 578).

[185] If a request is not tailored to obtain the information sought by the government, it will collect a broad array of irrelevant information for which the government has little need. Consequently, the more tailored the government's request for information, the more likely it can show a need for the information.

III. THE INTERSECTION OF THE PIV STANDARD & INFORMATIONAL PRIVACY

The PIV Standard's requirement that federal employees and contractor-employees submit to an NACI background investigation to obtain a PIV Credential violates the informational privacy rights of these workers.[187] This Article employs the lessons and guideposts derived from *Whalen* and *Nixon* to determine (a) if the non-sensitive JPL contractor-employees have a legitimate expectation of privacy in the information the NACI investigation attempts to collect and (b) if the JPL contractor-employees' privacy interests outweigh the government interest in collecting the information. The Article concludes that these individuals do have a protected privacy interest in much of the information the government seeks to collect and that interest outweighs the government's interest in its collection.

A. The Constitutionally Protected Personal Information Collected by the PIV Standard's NACI Investigation

The "reasonable expectations" analysis of the majority of circuits largely follows the guideposts set forth by the Supreme Court in *Whalen* and *Nixon* to determine if information is protected.[188] Here, we consider the nature of the information, particularly whether it is a type of information an individual would not customarily disclose. To the extent an individual may disclose such information, we take into account whether it is a private disclosure to a small group, such as family members, physicians, and close friends, or a broader disclosure to those in less intimate relationships with the individual.

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[186] *See Nelson*, 530 F.3d at 880-81 (considering whether the requests for information were in furtherance of a legitimate interest and narrowly tailored to achieving that interest after it had considered the factors articulated by the Third Circuit).

[187] For a discussion of the impermissibility of conditioning employment on waiver of the right to informational privacy, see *supra* note 101 and accompanying text. For a discussion of the mandatory nature of these background investigations, see *supra* note 11 and accompanying text.

[188] *Compare supra* Part I.A, *with supra* Part I.B.1.b.

Here, there are several aspects of the PIV Standard's NACI investigation, detailed *supra* Part I.D, which collect and store (or authorize the collection and storage of) information that is of an intimate personal nature not customarily disclosed to individuals outside an individual's inner circle. In particular, the investigation requires disclosure of various aspects of protected medical, financial, and private behavioral information.

1. Protected Medical Information

SF 85 requires the applicant for a PIV Credential to disclose medical information in which he or she holds a privacy interest. First, the applicant must identify any "treatment or counseling received" for illegal drug use as well as those drugs used in the past year.[189] This question requires disclosure not merely of the existence of a doctor or therapy visit, but also the purpose of the visit: substance abuse treatment. An individual holds a reasonable expectation of privacy in his medical treatments for substance abuse, particularly given the social stigma associated with the underlying conduct.[190]

Moreover, this disclosure may, in effect, disclose an applicant's medical condition as an addict to illegal substances (prescription or otherwise). Cases finding a reasonable expectation of privacy in medical conditions tend to deal with one's HIV status, but have extended at least as far as physical disabilities and defects.[191] Despite the historical view of habitual drug abuse as a "moral failing," medical authorities "recognize drug addiction as a brain disease . . . ."[192] Thus, the effective disclosure of one's status as a drug addict is a disclosure of a medical condition bearing on one's psychological health. Although AIDS arguably carries a greater social stigma than drug addiction,

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[189] SF 85, *supra* note 77, at 5 (question 14).

[190] *See supra* notes 158, 161-62.

[191] *See supra* note 159.

[192] NORA VOLKOW, NATIONAL INSTITUTES OF HEALTH, SCIENCE OF ADDICTION ¶ 1, http://www.ama-assn.org/ama1/pub/upload/mm/388/sci_drug_addiction.pdf (last visited Oct. 9, 2010).

"information about a person's psychiatric health and substance-abuse history in particular, is information of the most intimate kind."[193]

The investigative request forms sent to the applicant's personal references, former employers, and residential contacts[194] also collect information that triggers informational privacy protection. The forms request these contacts relay any information, favorable or unfavorable, about the applicant's "mental or emotional stability."[195] Thus, this question overtly collects information about the applicant's psychological health, some of which may not be facially apparent or known by members of the public, but merely disclosed by the individual to intimate acquaintances, i.e. information in which the individual retains a reasonable expectation of privacy.[196]

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[193] O'Connor v. Pierson, 426 F.3d 187, 201 (2d Cir. 2005). The protection of substance abuse treatment or counseling information is particularly important to avoid deterring abusers from engaging in treatment, thereby perpetuating the personal and societal drug problem.

In theory, the disclosure of the applicant's illegal use of prescription drugs in the past year may bring about the revelation of the applicant's legal use of the same prescription drugs (e.g. abuse of a pain killer or anti-depressant medication after expiration of the prescription). Generally, an individual holds a reasonable expectation of privacy in his or her prescription information. *See supra* note 160. However, the tenuous link between a question about illegal drug use and the incidental disclosure of the legal use of prescription drugs renders this privacy interest negligible, particularly given most courts' unwillingness to find a reasonable expectation of privacy in criminal activity, including illegal, private drug use. *See infra* note 203.

[194] *See supra* note 93 and accompanying text.

[195] *See supra* note 93 and accompanying text.

[196] *See supra* note 161. The fact that the government collects this information from a third party to whom the applicant had to have previously disclosed this information (unless it was *publicly* known or viewable) does not wholly diminish the applicant's expectation of privacy in the information. The reasonable expectation of privacy approach recognizes and protects varying "modulations" of privacy, meaning an applicant may disclose personal information (e.g. his depression) to a close friend but retain a reasonable expectation that the government (or a nosey neighbor) will not acquire this information. *See, e.g.*, United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 n.5 (3d Cir. 1980) (quoting Fried, *supra* note 153, at 483); *see also supra* note 153. Moreover, the background investigation requires the applicant to facilitate the government's third party inquiry. *See supra* note 87.

Additionally, the investigative request forms present these inquiries under the guise the applicant has consented to the disclosure of any and all information pertaining to the questions. *See* FORMS 41-44, *supra* note 91, at 1 (expressly noting the applicant consented to the disclosure of this information). The contact is further pressured

2. Protected Financial Information

While SF 85 does not directly solicit protected financial information from the applicant, the investigative request forms distributed to the applicant's contacts as part of the background investigation do solicit such information.[197] These forms request the applicant's three references, former employers, and residential contacts to disclose and discuss any adverse (or favorable) information about the applicant's "financial integrity."[198] Such a vague inquiry could logically result in the collection of protected information about the applicant's unpaid debts, fluctuating income, or depreciating property that is known only by the applicant's intimate acquaintances or a restricted few individuals.[199] Moreover, in the context of a release comparable to the one authorizing the dissemination of investigative request forms, the Seventh Circuit has found, by analogy, that inquiries into a "virtually limitless range of confidential financial information" trigger informational privacy protection even if the individual cannot identify a specific piece of protected financial information.[200]

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to complete the form fully and in detail for two additional reasons: 1) the form imposes a sense of public responsibility for an honest and full completion of the form by the contact as it overtly indicates the forms will be used to make suitability and security clearance determinations, and 2) the forms indicate failure to complete them will impair the applicant's employment prospects by impeding the investigation process. *See* FORMS 41-44, *supra* note 91, at 1 (indicating use for determining "eligibility" or "suitability" and making "security clearance" determinations and noting "[c]ompletion of this investigation as soon as possible will help this person and the agency perform their duties in a more timely and efficient manner"). These pressures, together with the ostensible indication of the applicant's consent, may lead the contact to disclose, in detail, significant personal information, despite an extremely finely printed sentence suggesting the form should take only five minutes to complete. *See* FORMS 41-43, *supra* note 91, at 1; FORM 44, *supra* note 91, at 2.

[197] FORM 41, *supra* note 91, at 2 (question 5-6); FORM 42, *supra* note 91, at 2 (question 7-8).

[198] *Id.*

[199] *See supra* note 164. Again, the initial disclosure by the applicant to this third party does not necessarily overcome or eliminate the applicant's privacy interest in retaining limitations on the government's collection of it. *See supra* note 196.

[200] *See* Denius v. Dunlap, 209 F.3d 944, 958 (7th Cir. 2000); *see also supra* note 163.

3. Protected Private Behavioral Information

The investigative request forms sent to the applicant's employers, residential contacts, and references seek private behavioral information as they request the contact to disclose any information about the applicant's "abuse of alcohol and/or drugs" and "general behavior or conduct."[201] In so far as this question seeks information about the individual's private, legal use of alcohol and other legal activities, particularly if engaged in one's home, it seeks protected information.[202] Moreover, just as with financial information, a vague and virtually limitless inquiry into adverse information about the applicant's "general behavior" suffices to trigger informational privacy protection even if the applicant cannot identify a specific protected piece of information.[203]

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[201] FORM 41, *supra* note 91, at 2 (question 5); FORM 42, *supra* note 91, at 2 (question 7).

[202] *See supra* note 166.

[203] *Cf. Denius*, 209 F.3d at 958, discussed *supra* note 163. SF 85's broad release, *see supra* notes 87-90 and accompanying text, falls squarely within the Seventh Circuit's holding concerning vague releases permitting limitless inquiries into protected matters. *Denius*, 209 F.3d at 958. In the case of SF 85's release, these matters involve medical, financial, and academic information. *See supra* notes 87-90 and accompanying text. SF 85 also potentially collects protected personal information concerning private behavior by requiring the applicant to disclose recent illegal drug use. *See supra* note 193 and accompanying text. The prevailing view, including that of the Ninth Circuit, is that an individual maintains no reasonable expectation of privacy regarding illegal drug use since "[v]alidly enacted drug laws put citizens on notice that this realm is not a private one." Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986); *see also, e.g.*, Aid for Women v. Foulston, 441 F.3d 1101, 1118 (10th Cir. 2006); Nat'l Treasury Employees Union v. U.S. Dep't of Treasury, 25 F.3d 237, 243 (5th Cir. 1994); *cf.* Fleisher v. City of Signal Hill, 829 F.2d 1491, 1498 (9th Cir. 1987) (finding no privacy claim attached to sexual conduct in violation of state statutory rape law as the "illegality of [the individual]'s behavior creates a substantial barrier to his successfully asserting a privacy claim"). Thus, collection of "[a]ccurate information concerning such unlawful activity" lacks any protection from the "right of confidentiality." *Mangels*, 789 F.2d at 839.

However, Third Circuit precedent suggests a privacy interest may exist in illegal drug use if engaged in privately, such as in one's home. *See* C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 180 (3d Cir. 2005). In *Ridgewood*, the court found an employee questionnaire soliciting information about an individual's sexual activity, drug use, and alcohol use was "of course [] intimate and private." *Id.* (quoting the district court, C.N. *ex rel.* J.N. v. Ridgewood Bd. of Educ., 319 F. Supp. 2d 483, 495 (D.N.J. 2004) (alteration in original)). Previously, the Third Circuit found a reasonable expectation of privacy in behavioral information, such as drinking and gambling, to the extent the informa-

B. The Government's Interest in Obtaining this Protected Information

While the previous section highlighted the specific aspects of the PIV Standard's background investigation that trigger the right to informational privacy, this section considers the precise governmental interest in collecting the protected information.

The federal government asserts a broad national security interest in the NACI investigations,[204] but the Ninth Circuit focused on two more narrow governmental interests in investigating its contractors that the Court deemed legitimate: (1) "an interest in verifying its contractors' identities to make sure that they are who they say they are"; and (2) "an interest in ensuring the security of the JPL facility so as not to jeopardize the costly investments housed therein."[205] Thus, the former interest relates to identity verification and the latter interest relates to whether the employee is suitable for employment at JPL.[206]

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tion encompassed "private drinking habits and more secretive gambling, such as in a small group game." Fraternal Order of Police, Lodge No. 5 v. City of Phila., 812 F.2d 105, 116 (3d Cir. 1987). Thus, the Third Circuit's dividing line was not legality, but whether the conduct occurred within the private sphere or public sphere. *See id.*; *cf.* Stanley v. Georgia, 394 U.S. 557, 564 (1969) (finding an expectation of privacy to view obscene materials within one's home).

[204] Nelson v. NASA, 512 F.3d 1134, 1145 (9th Cir. 2008). To employ such a broad interest in the analysis is not particularly helpful. The term "national security" is amorphous and malleable; it provides little guidance to a court since almost any legislative and executive decision could be connected to national security and it would inappropriately tilt the scale too far in favor of upholding government action because the Supreme Court has made clear that "no governmental interest is more compelling than the security of the Nation." *See* Haig v. Agee, 453 U.S. 280, 307 (1981) (citing Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)) (noting that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation"). Thus, the better approach, and the approach taken by the Ninth Circuit, is to consider the specific governmental objectives that the government believes will enhance national security—here, identity verification and ensuring security of the JPL facility. Nelson v. NASA, 530 F.3d 865, 880 (9th Cir. 2008).

[205] *Nelson*, 530 F.3d at 880.

[206] The Ninth Circuit's opinion does not explicitly characterize the latter interest as an interest in assessing suitability, but earlier in its opinion it does describe the investigations as intended to "determine whether the employee is 'suitable' for continued access to NASA's facilities . . . ." *Id.* at 871.

The government's legitimate interest in conducting these NACI investigations, however, is even narrower: the government's only motivating interest in the investigation was identity verification and the employee's suitability was not at issue.[207] The Department of Commerce and OMB have specifically justified the background investigations under the rubric of identity verification.[208] The PIV Standard expressly provides "the scope of this standard is limited to authentication of an individual's identity."[209] In fact, the Department of Commerce listed completion of SF 85 and the corresponding investigation in the PIV Standard's section appropriately titled, "Identity Proofing and Registration of New Employees and Contractors."[210]

Similarly, the Department of Commerce and OMB have expressly stated that successful completion of the PIV Standard's required investigation does not determine the related security issue of whether the applicant should or does receive access to a given facility or information system. The Department of Commerce stated that "[t]he decision of who will have access to which facility or computer system is outside the . . . [PIV] [S]tandard."[211] Similarly, OMB has stated the PIV Standard's required investigation "is not the same as the investigations required for personnel security clearances or for public trust determinations."[212] These statements evidence that the PIV Standard investigations are not intended to decide the overarching security question of who should have access to a facility or information system. Rather, and as the PIV Standard itself indicates, the purpose of these investigations is merely to verify that the individual applying for the PIV Credential is who he or she claims to be.[213] This purpose relates directly to HSPD-12's first control objective of ensuring the identification credential "is issued based on sound criteria for verifying an individual employee's identity . . . ."[214] Thus, agencies and departments retain their existing processes for performing the security check that will determine if an individual may have access to a facility or information system.[215] The PIV Standard investigation simply does not affect this national security function.

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[207] This distinction is crucial as the government could collect a much broader swath of information under the guise of national security or a suitability assessment than under the more limited interest of identity verification. *See supra* note 204.

[208] FIPS 201, *supra* note 8, at 5-6; OMB GUIDANCE DOCUMENT, *supra* note 8, at 4-5.

[209] FIPS 201, *supra* note 8, at 2.

[210] *Id.* at 53-54.

[211] Press Release, Dep't of Commerce, Frequently Asked Questions About the Standard for Personal Identity Verification (PIV) of Federal Employees and Contractors (Feb. 25, 2005), http://2001-2009.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_004362 [hereinafter Dep't of Commerce Press Release]. The individual agencies will retain the authority to determine which individuals have access to its facilities and information systems. *Id.*

[212] OMB GUIDANCE DOCUMENT, *supra* note 8, at 10.

Accordingly, when one balances the interests, one must balance the applicant's privacy interest in the collected information against the government's interest in obtaining the information *for purposes of identity verification*, not for purposes of suitability assessment or national security per se.[216]

C. The Balancing of Interests and Relevant Factors

In balancing the individual's privacy interest against the government's interest in identity verification, one must take into account the various factors articulated by the Supreme Court in *Whalen* and *Nixon*: (1) the nature of the information collected; (2) the scope of the information collected in relation to the privacy interest and the government's interest; (3) the existence of safeguards to prevent unauthorized dissemination after collection; and (4) the availability of practical alternatives.[217] After weighing these factors and the interests, this Article concludes that the government's interest in identity verification cannot sustain the use of the broad NACI investigation on non-sensitive contractor-employees.

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[213] FIPS 201, *supra* note 8, at iii-iv, 1-2, 5, 53-55; *see* OMB GUIDANCE DOCUMENT, *supra* note 8, at 4-5; *see also supra* notes 208-10 and accompanying text.

[214] HSPD-12, *supra* note 7, ¶ 3.

[215] *See* Dep't of Commerce Press Release, *supra* note 211.

[216] *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (prohibiting post hoc rationalization of agency action for judicial review).

[217] *See supra* notes 129-32 and accompanying text.

Much of the information collected is of a highly personal nature. The collection of information about one's substance abuse treatments, mental and emotional health, and financial well-being is of a particularly personal nature. These details are often shared with only those in an intimate relationship with the individual (though, in some circumstances, this information may be apparent without an intimate relationship).[218] At the same time, some information such as one's lawful consumption of alcohol is typically far less intimate information and often shared freely with others.

However, the government's interest in collecting this personal information—identity verification—relates only minimally with much of the personal information collected, even the less intimate information. The OPM originally developed the SF 85 form with its attendant NACI background investigation as a means to assess whether an employee or job applicant was *suitable* for a particular position.[219] Thus, these forms were designed to provide a much broader assessment of an individual's "age, health, character, knowledge, and ability" than would be necessary or useful to the government's current purpose of verifying an individual's identity,[220] which was the government's only true interest for developing the PIV Standard and its background investigation.

By way of example, the government collects medical and financial information in a manner that largely fails to further its purpose of identity verification. Whether an individual has recently engaged in substance abuse treatment by itself will not facilitate identity verification. This information must be coupled with other information that the government can use as a cross-reference. For example, the government could request the name of the treating psychologist, who it could then contact to determine if the PIV applicant was actually a previous patient that met the same description the government has for the applicant. In addition to not collecting enough information to allow for adequate cross-referencing of the applicant's identity, SF 85 also has no rational basis related to the purpose of identity verification for singling out substance abuse treatment from other medical visits. Any type of medical visit, when coupled with adequate information to allow for cross-referencing, can serve as a means of verifying a person's identity. And, the government could achieve this result with far less intrusive inquiries that request only a general list of physicians or therapists visited by the applicant in the past year without soliciting the reason for the visit.[221] These factors suggest the government has gone well beyond its identity verification purpose and has begun to assess suitability.

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[218] For example, one may readily identify an emotionally unstable individual after only a single encounter. It is less likely, however, that individuals outside of one's intimate circle would know the details of an individual's participation in a private substance abuse treatment program and his struggles with at times less apparent psychological issues such as depression or anxiety.

[219] These forms expressly identify their purpose as for suitability determinations. SF 85, *supra* note 77, ¶ 1; FORMS 41-43, *supra* note 91, at 1. Although applicable only for positions requiring access to classified information, not those completing SF 85, Forms 41-43 also identify "security clearance" determinations as a purpose. Forms 41-43, *supra* note 91, at 1; *see also supra* note 77-78 and accompanying text.

[220] 5 U.S.C. § 3301(2) (2006); 5 C.F.R. § 731.101(a) (2009).

The government's collection of information regarding the applicant's financial integrity poses the same problem. The government could gather information such as the names of banking and credit institutions with which the applicant has an account,[222] and then proceed to contact these institutions to cross-reference, among other things, whether an account actually exists (but not its content or type), whether the applicant has used any aliases with that institution, and whether the applicant's contact information matches against the information the institution has on file.[223] Yet, the government has instead attempted to learn about the applicant's "financial integrity," which itself has no relation to identity verification (unless cross-referenced with other information, such as a bankruptcy proceeding), and has made no effort to solicit information that could be used to cross-reference the applicant's identifying information.

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[221] This alternative approach of requiring disclosure of physician and counseling contacts without identifying the treatment received may still implicate privacy concerns as the specialization of practitioners may, in effect, disclose the reason for the visit. For example, a timid, middle-aged man may not wish to disclose the name of a doctor specializing in erectile dysfunction for fear the recipient of that information could easily deduce the purpose of his visit.

Similarly, if protected, an individual's private drug use bears only an inferential relationship to identity verification. Drug use provides an identifying characteristic only to the extent a noticeable physical or psychological trait develops or another individual confirms the drug use, which is, in theory, irrelevant with true private drug use. Thus, the actual description of this drug use is superfluous to identity verification as the government needs only to inquire into the resulting characteristics. However, SF 85 and the investigative request forms broadly require disclosure of drug use, but fail to solicit information about identifying characteristics that have emerged from the drug use.

[222] This approach may nonetheless implicate privacy problems where an individual identifies institutions from which one could deduce financial instability or insolvency (e.g. a loan shark). However, the tailoring of this approach makes it significantly less intrusive. Moreover, the government could further tailor it by requiring disclosure of

Finally, the investigative request forms go far beyond what is needed to achieve the government's identity verification purpose. The government uses expansive inquiries that fail to guide the responding contact to provide information that is limited to (or even pertains to) identity verification. The government's interest in contacting these individuals is substantially diminished where it employs a request that solicits information that may not even remotely pertain to identity verification.[224]

Although the government's interest is diminished given the broad scope of the background investigations, the protections against the government's subsequent disclosure of collected information weighs in its favor. Statutory protections limit the government's use and dissemination of the collected information, protecting against inadvertent disclosures.[225] All departments and agencies implementing the PIV Standard must comply with the requirements of the Privacy Act.[226] The

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only major institutions that run the gamut of financial accounts (e.g. Bank of America or CitiBank).

[223] Financial institutions often rely on credit reports containing identifying information about the individual, such as aliases and addresses. Thus, these institutions may prove a useful cross-reference for confirming an applicant's identity.

[224] Denius v. Dunlap, 209 F.3d 944, 958 (7th Cir. 2000) (finding broad release of confidential financial information to impermissibly intrude on privacy, as it failed to specifically cater to any government interest); *see also supra* note 200 and accompanying text.

[225] *See supra* notes 115, 179 and accompanying text.

[226] HSPD-12, *supra* note 7, ¶ 6 ("This directive shall be implemented in a manner consistent with . . . the Privacy Act (5 U.S.C. 552a) . . . .").

Privacy Act prohibits the disclosure of the collected information unless the applicant provides written consent or a written request for disclosure, or a statutory exception applies.[227] Moreover, agencies must "appoint a PIV privacy official, assess their PIV systems to ensure privacy is protected, identify information to be collected about individuals and how the information will be used, . . . adhere to fair information practices, and audit systems for compliance with privacy policies and practices."[228]

These statutory protections, however, contain at least one shortfall: they do not protect against several types of nonconsensual disclosure of the collected information.[229] In several instances, the Privacy Act expressly permits disclosure without the applicant's consent.[230] For example, in addition to the expansive routine use exemption,[231] "[s]pecific exemptions exist for disclosure to agency employees, the Bureau of the Census, the National Archives and Records Administration, [and] Congress or its committees . . . ."[232] Moreover, even in the presence of adequate safeguards, the mere collection of the information itself may impermissibly intrude on privacy interests.[233] This failure to protect against these types of disclosures undermines, to some extent, the strength of the statutory protections against disclosure.

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[227] 5 U.S.C. § 552a(b) (2006). The most prolific statutory exception is the Privacy Act's "routine use" exemption. Todd Robert Coles, *Does the Privacy Act of 1974 Protect Your Right to Privacy? An Examination of the Routine Use Exemption*, 40 AM. U. L. REV. 957, 959 (1991) ("The routine use exemption has threatened to emasculate the Privacy Act's protection of individual privacy."). For a discussion of how this exemption may undermine the safeguards against non-consensual disclosure of the collected personal information, see *infra* notes 229-32 and accompanying text.

[228] Dep't of Commerce Press Release, *supra* note 211.

[229] *See supra* notes 115, 122, 123, 180 and accompanying text (noting that failure to protect adequately against nonconsensual and inadvertent disclosure will weigh against the government).

[230] 5 U.S.C. § 552a(b)(1)-(12). For a complete discussion of these exceptions, see generally Coles, *supra* note 227.

[231] The broad routine use exemption permits nonconsensual disclosure if the use of it "is compatible with the purpose for which it was collected." Coles, *supra* note 227, at 967 n.61 (quoting 5 U.S.C. § 552a(a)(7)). "[R]outine uses must appear annually in the *Federal* Register." *Id.* (citing § 552a(e)(4)(D)).

[232] Coles, *supra* note 227, at 966 (citations omitted).

[233] *See supra* note 116 and accompanying text. The Ninth Circuit expressly reads *Whalen*'s informational privacy discussion as protecting both an individual's choice in the first instance "not to disclose highly sensitive information to the government," and, if collected, the individual's interest in receiving "assurance that such information will not be made public." Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 789-90 (9th Cir. 2002). Moreover, the protection of the PIV applicant from the initial collection

Finally, other efforts by the government to verify individual's identities, namely, the REAL ID Act, undermine the strength of the government's need to collect the information it collects through the background investigations. Like the PIV Standard, the REAL ID Act regulates the identification credentials, i.e., driver's licenses, required to access federal facilities, but makes no determination of who should be permitted to access the facilities, e.g. one will still need a boarding pass to go beyond airport security checkpoints.[234] To verify the identity of a driver's license applicant, the Act requires that the applicant present a separate photo identification credential, documents bearing the applicant's date of birth, proof of a social security account number, and confirmation of the applicant's current personal residence.[235] These requirements parallel several of the identity verification practices required by the PIV Standard.[236] However, the REAL ID Act conspicuously excludes any requirement for an NACI background investigation (or any other background investigation).[237] Yet, the Department of Commerce intends the REAL ID to be used by individuals to board aircraft, access federal facilities, and even enter nuclear power plants.[238] Thus, the REAL ID Act indicates a background investigation is not particularly needed to verify adequately an

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of the information and subsequent disclosure comports with the representative Third Circuit's view of privacy as "control over knowledge about oneself." *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 n.5 (3d Cir. 1980) (quoting Fried, *supra* note 153, at 483); *see also supra* note 153.

[234] *See supra* notes 60, 211-12 and accompanying text.

[235] REAL ID Act of 2005, Pub. L. 109-13, § 202(c)(1)(A)-(D), 119 Stat. 231, 312-13 (2005). The issuer of the driver's licenses must also verify the documents presented. *Id.* § 202(c)(1).

[236] For example, the PIV Standard requires presentation of photo identification, *see supra* note 76, disclosure of social security number, *see supra* text accompanying note 83, and information about one's current residence, *see supra* text accompanying note 84.

[237] *See* § 202, 119 Stat. at 312-13.

[238] DEP'T OF HOMELAND SEC., REAL ID FINAL RULE: QUESTIONS & ANSWERS 1, http://www.aila.org/content/default.aspx?docid=24291 (last visited Oct. 10, 2010) (on file with Mississippi Law Journal).

individual's identity when issuing an identification credential that may be used to access possible terrorist targets, such as airports and nuclear power facilities. The alternative means to verify identity used by the REAL ID Act indicate that the government could employ less intrusive alternatives under the PIV Standard without sacrificing its desire to maintain national security through accurate identity verification.[239]

In sum, much of the information collected by the government is of a highly personal nature and the scope of information collected by the government's investigation is, at best, loosely tailored to achieving the government purpose of identity verification. While the government has some controls to prevent inadvertent disclosures of the collected information, there are several gaps in these controls. Finally, the REAL ID Act evidences that practical alternatives to the background investigation exist and will not compromise the government purpose of identity verification. Given these factors, the balance appears to tilt in favor of finding that the government cannot use the background investigation for purposes of identity verification without violating the informational privacy rights of its employees.

CONCLUSION

Although the Supreme Court may use the current lawsuit between JPL contractors and NASA and other federal agencies as a means to narrow (or completely eliminate) the constitutional right to informational privacy, *Whalen* and *Nixon* both recognized the existence of a constitutional interest in informational privacy that protects against both the collection and dissemination of information in which an individual has a reasonable expectation of privacy. And in this case, the Supreme Court should conclude that the government's background investigations deprive the JPL contractors of their constitutional right to informational privacy because the investigations collect highly personal information, they are unduly broad in scope in light of the government's limited purpose of identity verification, they provide only moderate safeguards against subsequent disclosure of the collected information, and they are not necessary because practical and effective, yet less intrusive, means of achieving identity verification exist. Thus, the PIV Standard should be invalidated under an informational privacy analysis.[240] This invalidation will spare Dr. Nelson, his JPL colleagues, and other federal workers subject to the PIV Standard from facing the difficult choice between forfeiting either their privacy or their careers.

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[239] REAL ID Act § 202(c)(1)(A), (C) (listing alternatives such as a non-photo identity document with the person's full legal name and date of birth in place of a photo identity document, and verification that the person is not eligible for a social security account number in place of proof of the person's social security account number). Although employees and contractors will likely use their PIV Credential to access facilities and information systems more frequently than the average person will use a REAL ID license to access a nuclear facility, frequent business flyers may well board aircrafts as frequently as some employees and contractors access a facility or information system. Moreover, it must be remembered that receipt of a PIV Credential or REAL ID credential does not mean the individual will have authorization to access the facility or information system. *See supra* notes 60, 211-12 and accompanying text.

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[240] The principles of constitutional avoidance may offer courts another means of invalidating the PIV Standard. HSPD-12 lacks any express authorization for background investigations. *See* HSPD-12, *supra* note 7. However, Presidents have explicitly called for background investigations, even NACI investigations, in other contexts, such as security clearance eligibility. *See, e.g.*, 5 C.F.R. § 732 (2009) (implementing Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953)), discussed *supra* note 78. Thus, courts may narrowly construe HSPD-12 to clearly prevent the use of investigations, thereby avoiding issues of judicial deference to administrative decisionmaking. *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172-74 (2001) (employing constitutional avoidance to circumvent *Chevron* deference).

BOOK REVIEW

TOO BIG TO FAIL, TOO BLIND TO SEE

TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM–AND THEMSELVES. By Andrew Ross Sorkin. New York: Viking. 2009. Pp. 624. $32.95.

Reviewed by Tom C.W. Lin[*]

> "We just hit the iceberg. The boat is filling with water, and the music is still playing. There aren't enough lifeboats. [Someone is going to die.]"
>
> - Jamie Dimon, CEO of JP Morgan, on the eve of Lehman Brothers' bankruptcy.[1]

INTRODUCTION

The sky was falling in 2008. In March, investment bank Bear Stearns, having been founded in 1923 and survived the Great Depression, was sold for $2 a share to JP Morgan in a government-backed fire sale (p. 37). That September, the world witnessed the bankruptcy filing of the venerable investment bank Lehman Brothers and the largest point-drop in the Dow Jones Industrial Average's history.[2] The *New York Times* reporter, Andrew Ross Sorkin, in his book, *Too Big to Fail*, chronicles the fall of these financial institutions and the economic crisis that enveloped the world during this tumultuous period from the ultimate insider's perspective of key executives, public officials, attorneys, and regulators.

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[1] P. 336.

[2] *See* Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill is Sold*, N.Y. TIMES, Sept. 15, 2008, at A1.

In the burgeoning market of books that chronicle the events of the recent financial crisis,[3] *Too Big to Fail* stands out for its sheer size (coming in at 624 pages and 2.1 pounds) and its meticulous insiders' account of crucial meetings, decisions, and (even) thoughts of key players. According to Sorkin, his tome is a "product of more than five hundred hours of interviews with more than two hundred individuals who participated directly in the events surrounding the financial crisis" (p. xi). Sorkin's well-sourced narrative paints a tale that places the reader in important meetings, critical conference calls, and sometimes, into the minds of key principals—often revealing the profound, the private, and occasionally, the petty. The book reveals a secret ethics waiver obtained by then Treasury Secretary Hank Paulson, which allowed him to participate in discussions with his former employer, Goldman Sachs (p. 424).[4] The reader also learns that Paulson said, "[t]hat makes me want to vomit!," upon hearing that JP Morgan was elevating the purchase price of Bear Stearns from $2 to $10 (p. 36), and that he *actually* vomited in his office from stress and exhaustion during the height of the crisis (p. 468).

For attorneys, legislators, and regulators, the book highlights the inadequacy of the current regulatory apparatus to handle a modern financial crisis. The banking and securities rules of the 1930's, 1940's, and 1950's are simply not meant for a world created by what Sorkin calls "American-style financial engineering" (p. 3), with complex securities instruments marketed by uber-interconnected financial institutions that serve as financial wholesalers and supermarkets to each other and the masses. At various points in the book, we see the ad hoc approaches that regulators concocted in order to put out simultaneous fires because they lacked proper regulatory tools.[5] Current Treasury Secretary Timothy Geithner, then New York Federal Reserve President, encouraged bank mergers of various permutations to stave off a financial collapse; his persistence led some CEOs to refer to him as "'eHarmony,' after the online dating service" (p. 480).

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[3] *See, e.g.*, GREGORY ZUCKERMAN, THE GREATEST TRADE EVER: THE BEHIND-THE-SCENES STORY OF HOW JOHN PAULSON DEFIED WALL STREET AND MADE FINANCIAL HISTORY (2009); HENRY M. PAULSON, ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM (2010); ROGER LOWENSTEIN, THE END OF WALL STREET (2010); WILLIAM D. COHAN, HOUSE OF CARDS: A TALE OF HUBRIS AND WRETCHED EXCESS ON WALL STREET (2009); LAWRENCE G. MCDONALD & PATRICK ROBINSON, A COLOSSAL FAILURE OF COMMON SENSE: THE INSIDE STORY OF THE COLLAPSE OF LEHMAN BROTHERS (2009); GILLIAN TETT, FOOL'S GOLD: HOW THE BOLD DREAM OF A SMALL TRIBE AT J.P. MORGAN WAS CORRUPTED BY WALL STREET GREED AND UNLEASHED A CATASTROPHE (2010); KATE KELLY, STREET FIGHTERS: THE LAST 72 HOURS OF BEAR STEARNS, THE TOUGHEST FIRM ON WALL STREET (2009).

[4] An image of the waiver is included in the pictorial inserts in the middle of the book; *see also* Andrew Ross Sorkin, *Paulson's Secret Waiver to Work on Goldman Matters*, Oct. 19, 2008, *available at* http://www.andrewrosssorkin.com/?p=174.

Too Big to Fail offers a meticulous re-telling of one of the most important periods in recent history. As regulators, bankers, lawyers, scholars, and other interested parties sift through the rubble in search of knowledge about the crash, *Too Big to Fail* serves both as a chronicle of the recent past and a cautionary tale for the immediate future. Acknowledging past missteps, uncovering root causes, and correcting systemic shortcomings to prevent similar failure is arguably the key economic and regulatory challenge of our time.

Part I of this Essay summarizes key episodes of the financial crisis as covered by *Too Big to Fail.* Part II examines a potential explanation of the crisis unexplored in the book in light of the decline of neoclassical economic theory and the emergence of behavioral economic theory. Finally, this Essay closes with a brief conclusion.

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[5] Nearly two years following the maelstrom of the financial crisis, Congress passed landmark financial regulatory reform legislation aimed at providing more tools to regulators to prevent and to manage similar crises in the future. *See, e.g.*, Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES, July 22, 2010, at B3 (reporting on the expansion of federal regulatory powers in the new financial reform law); Edward Wyatt & David M. Herszenhorn, *In Deal, New Authority Over Wall Street*, N.Y. TIMES, June 26, 2010, at A1 ("The final bill vastly expands the regulatory powers of the Federal Reserve and establishes a systemic risk council of high-ranking officials, led by the Treasury secretary, to detect potential threats to the overall financial system."); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h41 73enr.txt.pdf.

I. THE CHRONICLES OF A CRASH AND RESCUE(S)

According to Sorkin, *Too Big to Fail* is structured like the 2004 Oscar-winning movie *Crash*, consisting of several seemingly independent storylines—the forced closeout sale of Bear Stearns, the precipitous failure of Lehman Brothers, and the colossal collapse of AIG—that form a collective narrative about a financial system (and the world) pushed to the brink.[6] The book opens in the Park Avenue apartment of JP Morgan CEO, Jamie Dimon, on September 13, 2008, with Lehman treading the thin line between rescue and ruin. Dimon summons his brain trust on a conference call and warns them "to prepare right now for Lehman Brothers filing . . . [a]nd for Merrill Lynch filing . . . [a]nd for AIG filing . . . [a]nd for Morgan Stanley filing . . . [a]nd potentially for Goldman Sachs filing" (p. 3). In doing so, Dimon was essentially commanding his senior executives to prepare for financial Armageddon. With that brief prologue, Sorkin begins his detailed chronicle of the crash and rescue(s) of the financial system.

The End of Bear Stearns

The end of Bear Stearns, in March of 2008, sent shock waves through the financial system, many of which continued to be felt for years after. Based on Sorkin's reporting, we discover that then Treasury Secretary Paulson was personally and secretly behind the "original paltry sale price" of $2 per share (p. 37). JP Morgan's purchase of Bear required a government backstop of $29 billion, for which "Paulson did not want to be seen as a patsy, bailing out his friends on Wall Street," so he insisted on a very low, nominal price (p. 37). Much to the chagrin and disgust of Paulson, Dimon would ultimately elevate the $2 price to $10 in order to secure a smooth shareholder approval vote. Dimon, in congressional testimony, compared the purchase of Bear Stearns to “buying a house on fire” (p. 71).

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[6] *See* Gabriel Sherman, *The Information Broker*, NEW YORK MAGAZINE, Nov. 8, 2009 ("The structure of *Too Big to Fail* is 'modeled almost shamelessly on the movie *Crash*,' Sorkin says. 'I thought you could sort of structure each of these various story lines, which seemed to be happening in this almost autonomous, semi-independent way, sort of like *Crash* does. And of course as the story progresses, they cataclysmically come together and you start seeing the connections between things.'").

The rescue of Bear by the government was necessitated by the lack of tools in the federal regulatory apparatus. Because Bear was a pure investment bank, the Federal Reserve and Treasury had limited means to provide direct assistance. As a result, the Federal Reserve had to work through a regulated bank, like JP Morgan, which had a major commercial banking arm, in order to save Bear. This lack of regulatory authority becomes a recurring theme during the financial crisis, as government officials continuously struggled to fend off massive failure with limited resources, and more troublingly, a limited legislative mandate.

The Fall of Lehman Brothers

With the specter of Bear’s death looming large in the spring of 2008, senior executives at Lehman Brothers and the federal government attempted to stave off another shock to the financial system by stabilizing Lehman. Dick Fuld, the then longtime CEO of Lehman, made various attempts at capitalization as institutional clients made runs at the bank and the market battered the stock in the wake of the subprime mortgage crisis. Fuld and senior federal officials discussed possible deals with Bank of America, Barclays, Warren Buffett, Morgan Stanley, and the Korean Development Bank.[7] In the book, Sorkin portrays Fuld as an intensely hard-charging executive bent on fighting back the rising tide against his firm, often to the detriment of his cause. Fuld was convinced that his firm was on solid ground, that market sanity would return, and that Lehman would weather this storm. “*They’d survive*, he told himself. *They always did*” (p. 12). Fuld’s confidence, and bunker mentality, perhaps inadvertently forced him to sabotage a deal with the Korean Development Bank at the eleventh hour by insisting on renegotiating a material term (pp. 215-16).

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[7] *See* Eric Dash, *5 Days of Pressure, Fear and Ultimately, Failure*, N.Y. TIMES, Sept. 16, 2008 (“Fuld redoubled efforts to execute his plan to sell parts of the firm. The once unthinkable notion of selling Lehman in its entirety was also put on the table . . . [and when Lehman] shares plunged to a bargain-basement price below $4, potential suitors came out of hiding, including Barclays of Britain and Bank of America.”).

As the fall of Lehman seemed imminent, Fuld came off as a paranoid and stubborn man who refused to accept the hard truth about the coming financial tsunami and continued to insist that his empire was simply being attacked by malicious rumors and short-sellers. "The shorts! The shorts!," Fuld bellowed. "That's what's happening here!" (p. 14). In the end, Fuld lost sympathy from both his peers and government officials, who also came to believe that he had no credibility. In meeting with the heads of the major banks to save Lehman, Paulson declared, "Dick is in no condition to make any decisions. . . . He is in denial" (p. 303). On September 15, 2008, after much effort, but no success by both public and private actors, Lehman Brothers filed for bankruptcy.[8] It was the largest bankruptcy of all time, with assets totaling over $600 billion.[9] The Dow dropped over 500 points that day.[10]

The Shotgun Merger of Bank of America/Merrill Lynch

As Wall Street and Washington worked feverishly to stave off the bankruptcy of Lehman, many sensed that the next domino to fall would be Merrill Lynch. Greg Fleming, the President and COO of Merrill, and John Thain, the new CEO, knew that they were the financial tsunami's next target as they scrambled to find capital to stabilize their firm. "If Lehman was swallowed up, there would be a run on the next biggest broker-dealer—and that was his [Thain's] firm. Merrill Lynch, perhaps the most iconic investment bank in the nation, was on the brink of ruin" (p. 310). With their very existence at risk, Merrill's senior executives turned to Morgan Stanley and Bank of

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[8] *See* Sorkin, *supra* note 2 (talking about how Lehman filed for bankruptcy); *see also* Carrick Mollenkamp et al., *Lehman Files for Bankruptcy, Merrill Sold, AIG Seeks Cash*, WALL ST. J., Sept. 16, 2008, at A1.

[9] *See* Sam Mamudi, *Lehman folds with record $613 billion debt*, MARKETWATCH, Sept. 15, 2008 ("Lehman Brothers Holdings is closing its doors with more than $600 billion of debt—the biggest bankruptcy in U.S. history.").

[10] *See* Stephen Labaton, *Wall St. in Worst Loss Since '01 Despite Reassurances by Bush*, N.Y. TIMES, Sept. 16, 2008, at A1 ("By the end of the day, the Dow Jones industrial average had dropped 504.48 points.").

America for a capital infusion. Once a deal with Morgan Stanley became unfeasible, Merrill turned its attention to Bank of America.

According to Sorkin's astute reporting, unbeknownst to Thain and Fleming, Bank of America had attempted to purchase Merrill the year before, without success, in a seller's market (p. 314). Now, the tide had changed, and it was a buyer's market and Bank of America was one of only a few potential buyers. While Merrill was only looking to sell a percentage of itself, Bank of America was looking to buy the whole company. With very little leverage and even less time, the Merrill team was able to convince Bank of America to make the purchase at a significant premium and fund its bonus pool with government support (p. 359).[11] Given the ethnography of the firms, many were surprised by their marriage. "Merrill Lynch, with a history of nearly one hundred years as one of the most storied names on Wall Street, would be sold to Bank of America for the biggest premium in the history of banking mergers. It was . . . as if Wal-Mart were buying Tiffany's" (p. 359).

The Bank of America-Merrill Lynch deal was done in such haste and under such pressure that more than a year after the merger, regulators, legislators, and shareholder advocates continue to examine the steps and missteps that led to the shotgun marriage. As of this writing, Ken Lewis and John Thain, the respective CEOs of Bank of America and Merrill, are no longer with the merged firm, and lawsuits and investigations relating to the merger persist.[12]

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[11] *See generally* Matthew Karnitschnig et al., *Bank of America to Buy Merrill*, WALL ST. J., Sept. 15, 2008, at A1.

[12] *See, e.g.*, *In re* Bank of America Corp. Sec. Litig., No. 09 MDL 2058 (S.D.N.Y. 2010); Dan Fitzpatrick & Kara Scannell, *Ex-BofA Chief Sued for Fraud*, WALL ST. J., Feb. 5, 2010, at A1 ("Former Bank of America Corp. Chief Executive Kenneth D. Lewis and the company's current consumer-banking chief were accused in a civil complaint of duping investors by failing to disclose mounting losses at Merrill Lynch & Co. before shareholders approved the securities firm's takeover by the giant bank."); Stephen Majors, *Bank of America Hid Losses, Lawsuit Says*, WASH. POST, Sept. 29, 2009, at A15 ("Bank of America executives improperly concealed billions of dollars in losses and billions in bonuses paid by Merrill Lynch before a shareholder vote on their proposed merger, Ohio's attorney general argued in a class-action securities lawsuit he described as among the largest in history.").

The Survival of Morgan Stanley & Goldman Sachs

Following the merger of Bank of America and Merrill Lynch, Wall Street shifted its focus to the last two pure investment banks—Morgan Stanley and Goldman Sachs. According to *Too Big to Fail*, Morgan Stanley sought capital from various sources, including the Chinese and Japanese, and contemplated merging with Citigroup, Wachovia, or JP Morgan among others (pp. 411, 415-16, 462-63, 478). Despite heavy pressure from the Treasury Department and the Federal Reserve to merge with another institution at a steep discount, John Mack refused to cower to the pressure and decided to seek another path to survival (p. 481). After intense negotiations, Mack was able to secure a $9 billion capital infusion from the Japanese bank, Mitsubishi. In a final twist of drama, the deal was set to close on Columbus Day, when banks in America and Japan were closed, so a wire transfer was not possible (p. 513). To facilitate the closing on an intercontinental bank holiday, a check was written—a check that read: "Pay Against this Check to the Order of Morgan Stanley. $9,000,000,000.00" (p. 518).[13]

Goldman Sachs, the widely held top investment bank of Wall Street, like Morgan Stanley, faced similar market and regulatory pressures. It was in need of a significant capital infusion at a time when funds were extremely scarce. Treasury officials initially pushed Goldman to merge with Wachovia, but subsequently declined to support the deal because of the public relations concerns stemming from the fact that many of the interested parties had significant ties to Goldman. As Warren Buffett succinctly put it:

> By tonight the government will realize they can't provide capital to a deal that's being done by the firm of the former Treasury secretary with the company of a retired vice chairman of

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[13] An image of the $9 billion check that saved Morgan Stanley is included in the pictorial inserts in the middle of the book; *see also* Andrew Ross Sorkin, *Morgan Stanley's $9,000,000,000.00 Check. That's $9 Billion!*, Nov. 20, 2008, *available at* http://www.andrewrosssorkin.com/?p=355.

> Goldman Sachs . . . . They'll all wake up and realize even if it was the best deal in the world, they can't do it.[14]

Goldman ultimately secured $5 billion of funding through Buffett's Berkshire Hathaway by giving Buffett a very generous deal in exchange for the capital and the oracle's imprimatur.[15]

In late September 2008, amid all the deal-making, both Morgan Stanley and Goldman Sachs—the last two independent investment banks—announced that they were becoming bank holding companies in order to gain access to more federal funds in exchange for greater regulatory oversight.[16] It was the end of a gilded era on Wall Street.

The Rescue of AIG (and Everyone Else)

Even as the individual institutions found remedies to their serious ills, the financial system as a whole remained at risk. A holistic remedy was needed for the financial system, and part of that remedy involved curing an institution that was not even an investment bank, but an insurance company—American International Group (AIG). For many years prior to the financial crisis, a unit of AIG sold credit default swaps, a form of "insurance" for bonds.[17] Investment banks would buy these swaps in order to hedge their holdings in the event of a bond default, in which case AIG would redeem the swap like an insurance payout. The banks purchased hundreds of billions of dollars of swaps as insurance, which incidentally was great for

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[14] P. 473.

[15] *See generally* Susanne Craig et al., *Buffett to Invest $5 Billion in Goldman*, WALL ST. J., Sept. 24, 2008, at A1 (explaining the conditions behind Warren Buffet's investment in Goldman Sachs).

[16] *See* Andrew Ross Sorkin & Vikas Bajaj, *Radical Shift for Goldman and Morgan*, N.Y. TIMES, Sept. 22, 2008, at A1 ("Goldman Sachs and Morgan Stanley, the last big independent investment banks on Wall Street, will transform themselves into bank holding companies subject to far greater regulation.").

[17] *See* Michael Lewis, *The Man Who Crashed the World*, VANITY FAIR, Aug. 2009 (describing the process by which AIG Financial Products sold the swaps); *see also* Carrick Mollenkamp et al., *Behind AIG's Fall, Risk Models Failed to Pass Real-World Test*, WALL ST. J., Nov. 3, 2008, at A1 ("AIG's credit-default-swaps operation was run out of its AIG Financial Products Corp. unit.").

AIG's bottom line.[18] But the problem was that AIG's assumptions for their swap business did not properly account for a major real estate market downturn and the potential for massive payouts—which was exactly what happened in 2008.[19] AIG was like a casino that took bets but did not have the funds to pay winners.

As the federal regulators examined the problem, they realized that AIG was the thin thread holding the financial system back from the brink. "As Paulson and Bernanke both knew, AIG had effectively become a linchpin of the global financial system," and failure was not an option (p. 394). AIG reported obligations on credit default swaps that were in excess of $300 billion in 2008 (p. 395). If AIG failed, the banks would be forced to "mark down assets and raise billions of dollars—a frightening prospect in the current markets" (p. 395). Moreover, if AIG failed, millions of average Americans, who purchased life and health insurance policies with AIG, would also be adversely affected. When President Bush was briefed on the issue he posed a pedestrian yet profound question: "An insurance company does all this?" (p. 401).

After false starts with a private bailout, the Federal Reserve structured a historic $85 billion loan to AIG in exchange for an 80% equity stake in the company.[20] The federal loan benefited not only AIG, but the numerous investment banks that had purchased the swaps since the loan made it possible for AIG to pay its swap obligations.[21] "More than a quarter of the bailout funds left AIG immediately and went directly into the accounts of global financial institutions like Goldman Sachs, Merrill Lynch, and Deutsche Bank, which were owed the money under the credit default swaps that AIG had sold them" (p. 532).[22]

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[18] *See* Mollenkamk, *supra* note 8 ("AIG became one of the largest sellers of credit-default-swap protection . . . [and f]or years, the business was extremely lucrative.").

[19] *See id.* ("AIG relied on . . . models to help figure out which swap deals were safe. But AIG didn't anticipate how market forces and contract terms not weighed by the models would turn the swaps, over the short term, into huge financial liabilities.").

[20] *See* Matthew Karnitschnig et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J., Sept. 17, 2008, at A1 ("Under terms hammered out Tuesday night, the Fed will lend up to $85 billion to AIG, and the U.S. government will effectively get a 79.9% equity stake in the insurer in the form of warrants called equity participation notes.").

[21] *See, e.g.*, Mark Pittman, *Goldman, Merrill Collect Billions After Fed's AIG Bailout Loans*, BLOOMBERG, Sept. 29, 2008 (describing how AIG used the loans that it received from the Federal Reserve to meet collateral calls).

Passing TARP and Bailing Out America

A day after the historic loan to AIG, Treasury Secretary Paulson and Federal Reserve Chairman Ben Bernanke met with key legislators to propose a systemic stabilizing solution in the form of a bailout bill in order to stem the spreading contagion that was the toxic financial assets on the books of major banks.[23] The proposal came in the form of a $700 billion program, now known as the Troubled Asset Relief Program (TARP), that would give the Treasury Secretary great authority to buy troubled financial assets and take other actions necessary to stabilize the financial system.[24] At the meeting, Bernanke made it gravely clear how much the country needed such a program: "If we don't do this . . . we may not have an economy on Monday."[25]

According to Sorkin, the genesis of TARP was a then-five-month-old document that Paulson had asked his deputies to prepare in the event of a financial doomsday scenario (p. 419). The document was entitled the "'Break the Glass' Bank Recapitalization Plan."[26] The first draft of the TARP bill presented to Congressional leaders was only three-pages long and gave the Treasury Secretary unbridled authority for oversight and post-hoc review (pp. 467-68).[27] After much political posturing—after all, it was a presidential election year—a bill was brought to the floor of the House of Representatives for a vote and it was rejected.[28] "Stock prices plunged, with the Dow Jones Industrial Average tumbling 7 percent, or 777.68 points, its biggest one-day point drop ever" (p. 499). After more political maneuvering, TARP was passed by Congress and signed into law by President Bush on October 3, 2008, giving the federal government more tools and resources to deal with the financial crisis.[29]

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[22] *See* Richard Teitelbaum, *Secret AIG Document Shows Goldman Sachs Minted Most Toxic CDOs*, BLOOMBERG, Feb. 23, 2010 ("Paris-based Societe Generale got the biggest payout from AIG, or $16.5 billion, followed by Goldman Sachs, which got $14 billion, and then Deutsche Bank and Merrill Lynch.").

[23] *See* Joe Nocera, *As Credit Crisis Spiraled, Alarm Led to Action*, N.Y. TIMES, Oct. 2, 2008, at A1.

[24] *See generally Summary of Financial Bailout Legislation*, REUTERS, Sept. 28, 2008, *available at* http://www.reuters.com/article/idUKTRE48R48220080928.

[25] Nocera, *supra* note 23.

[26] Andrew Ross Sorkin, *Source Document: Treasury's Confidential 'Break The Glass' Plan*, Nov. 29, 2008, *available at* http://www.andrewrosssorkin.com/?p=368.

[27] *See Text of Draft Proposal for Bailout Plan*, N.Y. TIMES, Sept. 21, 2008.

Too Big to Fail ends with a dramatic secret meeting in Washington where Paulson gathered the heads of the "Big 9" Wall Street firms and strongly encouraged them, in unequivocal terms, to sell tens of billions of dollars of preferred stock to the U.S. Government in exchange for TARP money in order to stabilize the system and avoid a second Great Depression (pp. 519-24). Some commentators compared the meeting to a "reverse holdup" because the banks were essentially forced to take government bailout money.[30] While there was some initial reluctance to sign the agreements, the banks ultimately had no choice, given the overwhelming pressure from their regulators. After all nine banks signed the agreements, Paulson felt like the country had "just crossed the Rubicon" (p. 528).

For most of the book, Sorkin does very little editorializing, explaining, and forecasting. Like a good reporter, he focuses on reporting the facts and events as they happened. However, in the book's brief *Epilogue*, Sorkin does wonder aloud: "Could the financial crisis have been avoided?" (p. 534); "[D]id the government's response mitigate it or make it worse?" (p. 534); and,

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[28] *See* Carl Hulse & David M. Herszenhorn, *House Rejects Bailout Package, 228-205; Stocks Plunge*, N.Y. TIMES, Sept. 30, 2008, at A1 ("In a moment of historic import in the Capitol and on Wall Street, the House of Representatives voted on Monday to reject a $700 billion rescue of the financial industry.").

[29] *See* David M. Herszenhorn, *Bush Signs Rescue Bill After House Vote*, N.Y. TIMES, Oct. 3, 2008, at A1 ("The House of Representatives gave final approval on Friday to the $700 billion bailout for the financial system, reversing course to authorize what may be the most expensive government intervention in history.").

[30] *See, e.g.*, Donald L. Barlett & James B. Steele, *Good Billions After Bad*, VANITY FAIR, Oct. 2009, at 204 (showing how bank executives were told to clear matters with their boards and accept TARP money in the aftermath of a meeting with Secretary Paulson).

Did Lehman have to fail? (pp. 535-37). While he does not provide judgment or answers to these questions, he does acknowledge that the financial system is in need of much reform and that the events chronicled in *Too Big to Fail* need to be studied for years to come to prevent similar calamities in the future (pp. 538-39).

II. AN UNEXPLORED EXPLANATION IN A MESSIER MODEL

Too Big to Fail contains little in terms of thorough diagnosis or explanation of the crisis, as Sorkin states that the book's purpose is to provide "the first detailed, moment-by-moment account of one of the most calamitous times in our history" and not necessarily to diagnose it (p. xii). While lacking in diagnoses and explanations, Sorkin's account offers diagnostic value for scholars who are searching for root causes of the crisis, much like a diligent fossil collector's find is to paleontologists theorizing about the extinction of dinosaurs. One explanation of the financial crisis, unexplored but insinuated in the book, is the fallacy of the neoclassical economic model that is at the foundation of our financial system. The financial crisis is in some ways a tragic tale about blind faith in false parables about perfectly efficient markets with uber-rational actors, and the need for a better economic archetype to augment the existing paradigm.

A. The End of Everything (As We Know It)

The American economy, and particularly the financial industry, is built on an elegant neoclassical free market ideology that is premised on rational actors and efficient markets. Prior to the financial crisis, unbridled free market capitalism was thought by many to be the superior, most evolved, economic system that should be adopted by the world over. At the beginning of *Too Big to Fail*, we hear this echoed by Sandy Weil, the former CEO of Citigroup, shortly before the crisis: "The whole world is moving to the American model of free enterprise and capital markets" (p. 4). Faith in the free markets and its self-corrective nature was strong and pervasive. Such fervent faith, coupled with continuous economic growth, made deregulation *the* guiding regulatory principle of the last few decades.[31] Deregulation, in part, made it possible for certain institutions to become too big to fail, and it also sowed the seeds for many of the financial crisis' poisonous fruits, such as dangerous short-selling, over-leveraged banks, and unsupervised investment banks.[32] The thinking among many in government, industry, and academia was: *why regulate when markets self-correct? After all, markets are smarter and more efficient than government bureaucrats.*[33] That line of thinking changed for many with the recent financial crisis, which brought the entire global economic system to the verge of collapse.

In the aftermath of the crisis, and in search of answers, many have begun to question our fundamental assumptions and understandings about our economy and our financial markets. *If free markets are self-correcting, then why did it need over a trillion dollars worth of government bailouts to survive? If investors are rational, why did so many invest in toxic assets?* In the wake of the crisis, both true believers and loyal critics of our free market system have expressed their either newly-founded or long-held doubts. Following the financial crisis, former Federal Reserve Chairman Alan Greenspan, an Ayn Rand apologist and free market proselytizer, expressed his "shock[]" and "distress[]" upon discovering a flaw in the free market ideology "that define[d] how the world works."[34] Similarly, Richard Posner, the prominent federal judge, legal scholar, and free-market ideologue from the University of Chicago, also expressed his doubts about the coventional understandings of American capitalism and our economy.[35] Posner went so far as to call himself a Keynesian now,[36] and call into question the practical utility of the works of his colleagues from the University of Chicago, the St. Peter's Cathedral of free market, laissez-faire economics.[37] These new views from Greenspan, Posner, and other purist free-market thinkers, amounted to apostasy to true believers, and forced everyone to re-examine the fundamental assumptions of our free market economic model. *Are free markets always self-correcting? Is deregulation always the better alternative to government intervention? Are individuals truly uber-rational actors?*

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[31] *See, e.g.*, SARKIS J. KHOURY, THE DEREGULATION OF THE WORLD FINANCIAL MARKETS: MYTHS, REALITIES, AND IMPACT (1990); Éric Tymoigne, *Securitization, Deregulation, Economic Stability, and Financial Crisis, Part I - The Evolution of Securitization* (Levy Econ. Inst. Of Bard College, Working Paper No. 573.1, 2009), *available at* http://www.levyinstitute.org/pubs/wp_573_1.pdf (last visited Nov. 1, 2010).

[32] *See* John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 782 (2009) ("[E]xcessive deregulation was a principal cause of the 2008 financial crisis.").

[33] *See, e.g.*, Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 3 (2003) ("Under the Efficient Capital Market Hypothesis, the 'smart' money will set prices and through the process of arbitrage will swamp the influence of the poorly informed or foolish. Even the unsophisticated therefore can rely on market efficiency to ensure that the price he pays for a security will be 'fair.'"); *see generally* A.C. Pritchard, *The SEC at 70: Time For Retirement?*, 80 NOTRE DAME L. REV. 1073 (2005).

[34] *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight & Government Reform*, 110th Cong. 36-37 (2008) (statement of

B. A New and Messier Model

In light of the financial crisis, the long-cherished, elegant free market economic model appeared inaccurate and inadequate. A new model, based on newly discovered understandings, is needed to make sense of the mess that was the financial crisis. One of the central tenets of the elegant neoclassical economic model is that individuals are wholly-rational and uber-disciplined.[38] In fact, much of financial regulation is pre-

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Dr. Alan Greenspan), *available at* http://oversight.house.gov/images/stories/documents/20081024163819.pdf.

[35] *See* Richard A. Posner, *How I Became a Keynesian*, NEW REPUBLIC, Sept. 23, 2009 ("We have learned since September that the present generation of economists has not figured out how the economy works."); *see generally* RICHARD A. POSNER, THE FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009); RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY (2010).

[36] *See* Posner, *supra* note 35 (saying that Keynes' views are still as relevant today as they were when Keynes published them).

[37] *See* John Cassidy, *After the Blowup*, THE NEW YORKER, Jan. 11, 2010, at 28 ("I think the challenge is to the economics profession as a whole, but to Chicago most of all.").

[38] *See, e.g.*, GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976) ("[A]ll human behavior can be viewed as involving participants who [(1)] maximize their utility [(2)] from a stable set of preferences and [(3)] accumulate an optimal amount of information and other inputs in a variety of markets."); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-79 (1998) (discussing the perception of individuals in the standard model, and showing how

mised on the reasonable investor as the homo economicus, the rational man.[39] Creating policies for the rational man is easy—give them access to all relevant information and all the possible choices and they will make the utility maximizing choice.[40] Yet extraordinary financial crises and ordinary daily life tell us that real individuals deviate greatly from their neoclassical uber-rational brethren. Real people lack perfect self-control and are not entirely logical,[41] and as a result, markets are not always perfectly efficient. A newer and messier model, premised on real individuals, who are inherently flawed, has been gaining prominence in the wake of the financial crisis.

Over the last few decades, a growing body of literature in behavioral economics has provided a strong case against the perfect rationality of individuals and the elegant efficient markets by placing greater emphasis on the messier human aspects of markets and their participants. For Richard Thaler, the prominent University of Chicago behavioral economist, the choice between neoclassical economics and behavioral economics is a "choice between being precisely wrong or vaguely

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bounded rationality, bounded willpower, and bounded self-interest, causes people to depart from the classical economic model).

[39] *See* Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors*, 13 SUP. CT. ECON. REV. 99, 111 (2005) ("[M]any courts appear to view the reasonable investor as referring to a normative idealized type of behavior, instead of a descriptive realistic depiction of actual behavior."); Joan MacLeod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?*, 15 WM. & MARY J. WOMEN & L. 291, 297 (2009) ("Decisional law and the related literature support the view that the reasonable investor is a rational investor."); David A. Hoffman, *The "Duty" to be a Rational Shareholder*, 90 MINN. L. REV. 537, 545 (2006) ("Rational shareholders know what they want and select it in the most efficient way available.") (emphasis omitted); *see generally* Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law,* 50 STAN. L. REV. 1551 (1998).

[40] *See* Richard H. Thaler, *Mortgages Made Simpler*, N.Y. TIMES. July 5, 2009, at 4; *see also* Hoffman, *supra* note 39, at 560 (pointing out that the "[c]lassical theory asserts that rational shareholders are presumptively able to evaluate the thousandth page in a prospectus just as well as the first" and use that information to make a rational decision).

[41] *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 669 (1999) ("[I]ndividuals often will be swayed by the force of their affective responses to events and decisions, regardless of whether their rational, sequential, analytical system would opt for a different course.").

right."[42] For Thaler, and others like him, the behavioral model is messy "[b]ecause human nature is a mess."[43] An explanation for the financial crisis unexplored by Sorkin, in *Too Big to Fail*, is the fundamental fallacy of the rational man assumption lying at the heart of our financial model and economy. While unexplored, Sorkin alludes to the notion that the root of the crisis may be more anthropomorphic than technical, more a failure of man than system. "[W]hether an institution—or the entire system—is too big to fail has as much to do with the people that run these firms and those that regulate them as it does any policy or written rules" (p. 539). Behavioral economists have convincingly challenged the neoclassical tenet of the rational actor by identifying certain cognitive limitations that bind our rationality, such as mental biases, heuristics, and other irrational impetuses.

Three types of interrelated cognitive limitations are worth noting in terms of the financial crisis: overconfidence, herd behavior, and cultural cognition. The meticulous narrative of *Too Big to Fail* serves as a wonderful case study into irrational behavior and its severe consequences.

Overconfidence

Individuals generally have an overabundance of confidence in their own abilities and an overabundance of optimism in their futures, despite facts to the contrary.[44] The story of the financial crisis is in many ways a story of hubris. It is a tale about individuals who bought homes that they could not afford,[45] bankers who thought that the market would only rise,[46] financial engineers who felt that they had mastered risk, and regulators who believed that they had control over financial risk.[47] A financial crisis is often thought of as a crisis of confidence—too little confidence.[48] But behavioral studies in economics and psychology suggest that financial crisis may also be caused by too much confidence, and that sometimes humility is all that stands between stability and collapse.

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[42] JUSTIN FOX, THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET 298 (2009).

[43] *Id.*

[44] *See, e.g.*, David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 334, 334 (Thomas Gilovich et al. eds., 2002) ("One of the most robust findings in the psychology of prediction is that people's predictions tend to be optimistically biased. By a number of metrics and across a variety of domains, people have been found to assign higher probabilities to their attainment of desirable outcomes than either objective criteria or logical analysis warrants."); *see also* Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 806 (1980) (showing how individuals can be overcome by unrealistic optimism).

Sorkin chronicles many instances of overconfidence on the part of key players in *Too Big to Fail.* There was Hank Paulson telling a Senate committee that if he was given temporary authority and funding ("bazooka[s]") to help Fannie Mae and Freddie Mac, then he may not have to use it, and Fannie and Freddie would stabilize, and he knew this because "[he has] been around [the] markets for a long time" (p. 200). Paulson, of course, turned out to be wrong. Then there was the strange case of Dick Fuld, who despite overwhelming facts to the contrary, still believed that his company was salvageable at a premium to its market price. This overconfidence in his firm, and his own abilities, led him to inexplicably destroy a deal with the Korean Development Bank at the eleventh hour that may have saved his beloved Lehman empire (pp. 215-16).

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[45] *See* Richard A. Posner, *Treating Financial Consumers as Consenting Adults*, WALL ST. J., July 23, 2009, at A15 ("It cannot just be assumed that most people who during the housing boom bought homes with adjustable-rate mortgages, or mortgages with prepayment penalties, or mortgages that required a low or even no down payment, were fools or victims of fraud."); Bianna Golodryga, *Do Homeowners Share Blame for Mortgage Mess?*, ABC NEWS, Oct. 7, 2008 ("More Americans than ever have become first-time homeowners in the last decade. It's become increasingly clear, however, that many of them couldn't keep up with home payments."); John Carney, *20 Year Old Buys Home With $183,000 FHA Loan And Just 3.5% Down*, BUS. INSIDER, Oct. 18, 2009 (giving an example of an overly optimistic homeowner).

[46] *See, e.g.*, *Hearing Before the Financial Crisis Inquiry Commission*, 12 (2010) (testimony of Lloyd C. Blankfein, Chairman and CEO, The Goldman Sachs Group, Inc.), *available at* http://www.fcic.gov/hearings/pdfs/2010-0113-Blankfein.pdf; David Ewing Duncan, *A Crisis of Overconfidence*, FORTUNE, Dec. 8, 2009 (stating that bankers were not immune from the wave of overconfidence that preceded the financial collapse); Malcolm Gladwell, *Cocksure*, NEW YORKER, July 27, 2009, at 24 (suggesting the roots of the financial crisis were partially psychological and the result of bankers believing that the market would continue to rise).

[47] *See* Anthony Faiola, Ellen Nakashima & Jill Drew, *What Went Wrong*, WASH. POST, Oct. 15, 2008, at A1 (reporting on the failure of regulators to curb financial risk); *see also* PRESIDENT'S WORKING GROUP ON FIN. MKTS., OVER-THE-COUNTER DERIVATIVES MARKETS AND THE COMMODITY EXCHANGE ACT 5 (1999), *available at* http://www.ustreas.gov/press/releases/reports/otcact.pdf.

[48] *See* Jonathan Alter, *America's New Shrink*, NEWSWEEK, Feb. 21, 2009, at 19 ("Too much confidence makes people and nations hubristic, while those on the receiving end feel conned. Too little confidence breeds timidity and uncertainty, which can be fatal.").

Herd Behavior

Herd behavior exists when people behave in a certain way simply because many other people are acting and thinking similarly.[49] The gravitational pull of the herd can lead individuals to make irrational decisions. In the financial context, herd behavior can result in stock market bubbles and crashes, as well as bank runs.[50]

During the financial crisis, there were many examples of herd behavior and its effects. Burgeoning investments in real estate by many led many others, for no rational reason, to invest in real estate, leading to a domestic real estate market bubble, which in turn led to a collapse in the mortgage securities market that was heavily invested in by investment banks. As a result, both weak and healthy financial institutions felt the thundering of the irrational herd, as every major bank in America tried to steel itself for the stampede. The herd mentality, as detailed in *Too Big to Fail*, was also evident in short sellers of bank stocks (pp. 81, 201), runs on the banks (pp. 10, 82), and efforts by regulators to minimize their impact. Herd behavior also reared its head in executive suites where some senior officers foresaw a looming crisis, yet did not take prudent action to swim against the tide. Chuck Prince, the then CEO of Citigroup, infamously said: "When the music stops, in terms of liquidity, things will be complicated, . . . [b]ut as long as the music is playing, you've got to get up and dance. We're still dancing."[51] Prince meant that so long as everyone else was making money off dangerously risky behavior, his firm was going to do the same.

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[49] *See generally* ROBERT R. PRECHTER, JR., THE WAVE PRINCIPLE OF HUMAN SOCIAL BEHAVIOR AND THE NEW SCIENCE OF SOCIONOMICS 152-53 (1999); *see also* Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q.J. ECON. 797, 798 (1992) (herd behavior involves "everyone doing what everyone else is doing, even when their private information suggests doing something quite different"); Laurens Rook, *An Economic Psychological Approach to Herd Behavior*, 40 J. ECON. ISSUES 75, 75 (2006) (showing how herd behavior influences individual behavior).

[50] *See, e.g.*, ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 149-53 (2000) (describing how crowd behavior can potentially have an effect on market dynamics).

Cultural Cognition

Based on a growing body of studies and literature, individuals tend "to conform their beliefs about disputed matters of fact . . . to values that define their cultural identities."[52] This tendency is known as cultural cognition.[53] In the run up and aftermath of the financial crisis, many public officials have railed against a seedy and avaricious "wall street culture" for bringing down the global economy. If there is a "wall street culture," then recent cultural cognition studies would imply that some of the irrational, suboptimal decisions made by key players during the crisis may not be completely attributable to avarice alone, but can, in part, be attributable to a cognitive over-identification with that culture and its values.[54] *Too Big to Fail* highlights many instances of the incestuous nature of the financial industry.[55] The regulators and the regulated often came from and traveled in the same circles.[56] Divergent backgrounds and dissenting views were often few and far between.

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[51] Rhys Blakely, *Should Chuck Prince go from Citigroup? The Web's Verdict*, TIMES ONLINE, Oct. 2, 2007, *available at* http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article2573692.ece.

[52] Yale Law School, The Cultural Cognition Project (including such matters of fact as "whether global warming is a serious threat; whether the death penalty deters murder; whether gun control makes society more safe or less"), *available at* http://culturalcognition.net (last visited Nov. 1, 2010).

[53] *See* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 150 (2006) ("[W]hat citizens believe about . . . empirical consequences . . . *derives* from their cultural worldviews.").

[54] *See generally* KAREN HO, LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET (2009) (exploring the belief systems and structure of the American financial industry).

[55] P. 437 (highlighting the close ties of key players to Goldman Sachs).

[56] *See* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 94 (2010) (identifying high level government officials during the financial crisis who were former Wall Street executives); OpenSecrets.org, Report: Revolving Door Spins Quickly Between Congress, Wall Street (June 3, 2010), http://opensecrets.org/news/2010/06/report-revolving-door-spins-quickly.html.

This absence of diverse and dissenting voices perhaps made signs of a calamitous crisis harder to identify and accept.[57]

Some critics have even suggested that *Too Big to Fail* may be an inaccurate account of the crisis because Sorkin is too close to his sources to be objective.[58] At his book party, the attendees included Jamie Dimon, the CEO of JP Morgan, John Mack, the then CEO of Morgan Stanley, hedge fund titan Ken Griffin of Citadel and other top echelon Wall Street players.[59]

The behavioral perspective of the financial crisis by no means excuses the poor, and often times troubling, decisions made by key players; instead, the behavioral perspective offers a possible explanation for how we came so close to the brink of collapse. Sorkin was right when he wrote that, "this drama is a human one, a tale about the fallibility of people who thought they themselves were too big to fail" (p. 7). *Too Big to Fail* may ultimately prove to be a tale about people who were too (cognitively) blind to see.

CONCLUSION

In the end, it may take years or even decades for journalists, legislators, regulators, and scholars to truly unravel and fully comprehend the causes of the financial crisis. While behavioral economics may be gaining prominence in the wake of the financial crisis, as we re-examine our current models and understandings, widespread policy acceptance and application of its tenets will likely, and rightfully so, take more time and study. To that end, Sorkin's reporting and narrative in *Too Big to Fail* is of great utility because it serves as a good first draft of history for those studying the failures of our economic system and exploring possible explanations.

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[57] CASS R. SUNSTEIN, GOING TO EXTREMES 85-93 (2009) (discussing how discussions of like-minded individuals can lead to extremism and group polarization).

[58] *See* Sherman, *supra* note 6 ("At bottom, [Sorkin's critics] see him as far too cozy with his sources . . . [and] wonder what, in the end, his privileged access is in the service of.").

[59] *Id.*

BOOK REVIEW

BONDING JUSTICE

THE BOND. By George Fletcher. Hart Publishing. 2009. Pp. 295. $17.95 (cloth).

Reviewed by Robert Steinbuch[*]

INTRODUCTION

George Fletcher is a preeminent law professor at an Ivy-League law school.[1] His scholarly writings have garnered significant acclaim among academics and practitioners in the legal field.[2] But outside of the often mis-labeled "academy," Fletcher's writings are likely not as broadly known. That might change with his first foray into fiction.

Fletcher has written an exciting and entertaining novel—*The Bond* (Hart Publishing 2009)—along the lines of popular legal fiction pieces such as *One L: The Turbulent True Story of a First Year at Harvard Law School* (1977)[3] and *The Firm* (1993). But *The Bond* is indeed quite more, as well.

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[1] *See* http://www.law.columbia.edu/fac/George_Fletcher (last visited May 16, 2010).

[2] *Id.*

[3] I realize that Turow claims that ONE L is a memoir, but its level of hyperbole belies that claim.

While *The Bond* overall is fiction, the themes undoubtedly are real—as are some of the specific events themselves. Fletcher has wonderfully and seamlessly woven together a love story, an analysis of the theoretical and intellectual complexities of law (far too often overlooked by lawyers, judges, and academics alike), an exploration of academic politics, and a brief history of select nineteenth century radical reformers. All four of these themes are interesting and exciting in their own right.

GROSSLY OPTIMISTIC

Fletcher tells his story through Adam Gross, an idealistic, yet slightly jaundiced, law professor who far more accurately depicts law professors than Turow's exaggerated and one-dimensional Kingsfield. Gross loves teaching, has a genuine admiration for his students (albeit in a marginally avuncular fashion), and struggles with, well, everything. He is a complex character, who is torn by his own strongly-held beliefs—and, ultimately, his own identity. This personal conflict drives Gross to seek both truth and justice in his own limited way through the process of teaching itself.

Here Fletcher particularly distinguishes *The Bond* from *One L*. *One L* was written from the perspective of a law student. The professors, therefore, were all but forced to become caricatures given the prism though which they were viewed. The opposite is true in *The Bond*. And, in fact, here Fletcher also separates himself from Gross. If Fletcher ever had the naive optimism of Gross, it has since matured into a realism inevitable with age and experience.

The context of the book—law school—presents a particularly opportune pallet for compelling story development, as it, like the law that it analyzes, is rife with drama, conflict, and resolution. This setting allows Fletcher to present the most enlightening aspect of *The Bond* to the lay reader—how legal academics develop legal analysis in the classroom and beyond. *The Bond* offers the core concepts of law school in a fashion both accessible and interesting to the intelligent non-lawyer and lawyer alike. This is no easy task. Legal novels too often rely on curiosities in the law that on the surface appear enlightening, but in reality are insignificant. Other books in this genre focus mostly on the emotional conflicts of the legal or law-school process (recall Turow) rather than substance—on the apparent belief that the latter does not provide for an interesting narrative. Fletcher debunks this approach in *The Bond*, focusing exactly on truly difficult questions in the law in the context of an engaging personal story.

ONE KILLING OR TWO

In *The Bond* Fletcher delves head on into the question of how the law should and hesitantly does address abortion when viewed alongside of pre-natal infanticide. Fletcher himself often has encouraged this discourse in his own classes. In *The Bond*, to the chagrin of his politically-correct colleagues more concerned with pursuing personal and political agendas than enlightenment and edification, Gross initiates a discussion of the legal consequences of killing a pregnant woman and what she is carrying in her womb (obscuring language intended). The conversation in Gross's legal philosophy class resulted in one student asserting that what a pregnant mother carries is equivalent to a tumor or an appendix in the student's superficial attempt to by-pass the philosophical challenge that Gross presented. But Gross sees this for the sleight-of-hand that it is.

Indeed, Gross focuses on the most difficult question in the abortion/life debate—and one that I witnessed first-hand when I worked on the Judiciary Committee in the U.S. Senate—whether when somebody kills a pregnant woman, he is guilty of two murders or just one. In 2004, Congress criminalized as homicide the killing of an unborn child when a pregnant woman is attacked.[4] While opponents of this bill wanted to prevent assaults on the fetus, they refused to recognize any killing/death of the baby/fetus whatsoever.[5] That is, like the self-assured law student in *The Bond*, these groups argued essentially that what a pregnant mother carries is equivalent to a tumor or an appendix. But, as the Hasidic student in Gross's class recognized, the issue is far more complicated. According to his dogma, "[although a]ccording to the Talmud, the fetus becomes a person when the head crowns, . . . the fetus is worth something, *even if it is not yet a full person*" (pp. 214-15). A contrasting position was offered by Gross's student Jaime Sullivan, the secularized former Catholic Priest, who continues to struggle with his identity and convictions. He presented a view that life begins only at the "quickening" (p. 49). He recognizes that this is perhaps an arbitrary line, but one that created the same consequences for actions toward the fetus regardless of the actor. While Fletcher's characters engage in a nuanced evaluation of the complexities of this legal, political, moral, and religious issue, most of this analysis was ignored in the actual debate in Congress. For sure, there were moments when the complexities of the issue were broached, but for the most part, the essential questions were left unaddressed.

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[4] Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified at 18 U.S.C. § 1841 & 10 U.S.C. § 919a (2006)). For a broader discussion of these issues, see Robert Steinbuch, *The Butterfly Effect of Politics over Principle: The Debate over the Unborn Victims of Violence Act and the Motherhood Protection Act*, 12 QUINNIPIAC HEALTH L.J. 223 (2009).

In fact, Fletcher delves into the nuances of the issue by having Gross discuss with his class an exam question in which an expectant mother is attacked by a cult member intent on killing the woman's unborn fetus. The twist is that the mother was on her way to have an abortion and winds up thanking her attacker. So the question is whether the attacker is guilty of a crime when he not only did what the mother wanted, but, in fact, had his actions ratified by her.

Unlike the Congressional debate, Fletcher—through Gross—begins to tackle the vexing problem of how we need to conceptualize this legal conundrum. Indeed, he addresses this challenge not with linguistic legerdemain or political prattle, but through real, thoughtful, and reasoned analysis. And he does so through the Socratic method characteristic of law-school education. As such, Gross pushes his class—and ultimately *The Bond*'s readers—toward self-enlightenment. That is not to say that Fletcher thrusts any one position on his readers. *The Bond* is neither Pro-Life nor Pro-Choice. It does, however, cause readers to analyze their beliefs with more rigor than I suspect many have done in the past.

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[5] *See* NATIONAL ORGANIZATION FOR WOMEN, "UNBORN VICTIMS" ACT DOES NOTHING TO DETER VIOLENCE AGAINST WOMEN, http://www.now.org/issues/legislat/200305.html#unborn (last visited May 16, 2010).

WE DON'T DO "DUE PROCESS"

For Gross this process of illumination comes with a high cost. Gross is assaulted by so-called colleagues with a differing political and social agenda for engaging in this intriguing examination of abortion and infanticide that contradicts the accepted dogma of legal academia. They happily trample Gross's individual rights, in a blatant power grab, during a process designed to topple the Dean and marginalize Gross. As they attack him with anonymous accusations, without affording him any opportunity to confront his accusers, Gross's opponents readily admit that the law that they teach and preach does not apply to their own actions: "Anyway, here within our [law school] community we do not operate like the courts. We prefer informal procedures. There's no need for the guarantees of due process" (p. 169).

Indeed, this lack of fidelity to established principles of equity is a growing problem in higher education. For example, the American Association of University Professors (AAUP) thoughtfully describes this phenomenon in the context of the abating of objective criteria for promotion and tenure and the concomitant rise of the illegitimate requirement of political and social conformity with entrenched institutional power brokers:

> In evaluating faculty members for promotion, renewal, tenure, and other purposes . . . universities have customarily examined faculty performance in the three areas of teaching, scholarship, and service . . . . [T]he[se] terms are themselves generally understood to describe the key functions performed by faculty members.
>
> In recent years, [the AAUP] has become aware of an increasing tendency on the part not only of administrations and governing boards but also of faculty members serving in such roles as department chairs or as members of promotion and

> tenure committees to add a fourth criterion in faculty evaluation: "collegiality."
>
> . . . .
>
> . . . [This] poses several dangers. . . . [This] exclude[s] persons on the basis of their difference from a perceived norm. . . . [C]ollegiality may be confused with the expectation that a faculty member . . . display an excessive deference to administrative or faculty decisions . . . .
>
> . . . [It also] chill[s] faculty debate and discussion. Criticism and opposition do not necessarily conflict with collegiality. Gadflies, critics of institutional practices or collegial norms, even the occasional malcontent, have all been known to play an invaluable and constructive role in the life of academic departments and institutions. They have sometimes proved collegial in the deepest and truest sense. Certainly a college or university replete with genial Babbitts is not the place to which society is likely to look for leadership. . . . The very real potential for a distinct criterion of "collegiality" to cast a pall of stale uniformity places it in direct tension with the value of faculty diversity in all its contemporary manifestations.[6]

As such, the AAUP well recognizes the importance of intellectual diversity amongst faculty rather than its flaccid substitute—identity politics.

THE STAIN OF IDENTITY POLITICS

In *The Bond*, Fletcher takes on identity politics, ridiculing the paternalistic claim by the two antagonist feminist faculty members at the fictional Regina Law School that female students in Gross's class comparing pre-natal homicide with legal abortion were in particular need of a grade adjustment due to their gender—to compensate them for the "difficulty" they might have had in handling the exam question reflecting the violent murder of a mother's unborn fetus/child. The notion that such an exam question would engender the ire of the politically correct *Gedankenpolizei* might seem the absurd province of exaggerated, and perhaps trite, fiction. Not so. Fletcher himself suffered similar indignation when the then-Dean of Columbia Law School, David Leebron, threatened Fletcher due to his inclusion of an almost identical question on his own criminal law exam.[7]

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[6] *See* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ON COLLEGIALITY AS A CRITERION FOR FACULTY EVALUATIONS, http://www.aaup.org/AAUP/pubsres/policydocs/contents/collegiality.htm (last visited May 16, 2010).

As law professors, both Gross and Fletcher eschew inconsistent positions. Indeed, law professors routinely distinguish law from its baser cousin politics on the ground that the former must have unifying and overriding principles. Conflicting positions in the law, therefore, chip away at its legitimacy and undermine the stature of those who teach and practice in it. Thus, Gross revels when his attackers do exactly that. *The Bond*'s antagonists suffer from the incompatible beliefs that while women are undoubtedly entitled to equal rights, those in Gross's class singularly should be viewed as inherently too delicate to be able to rationally handle his (and Fletcher's) written exam question. Thus, as Fletcher puts it, when the two attacking professors present their indictment of Gross, he "began to glimpse the twilight zone between reason and slapstick" (p. 33). I suspect Fletcher felt the same, notwithstanding that he was forced to endure this maelstrom of political correctness. Gross fares well enough also.

In this regard, *The Bond* is reminiscent of Philip Roth's *The Human Stain* (2003). Roth's story itself is a reflection of the life of Anatole Broyard, who, like the protagonist Coleman Silk, was a light-skinned African American who years prior passed himself off as white in order to avoid racism. Ironically, Silk, a classics professor, is falsely accused of being a racist, but is precluded by the past that he never disclosed from using his own story to demonstrate the folly of the charges. Although Fletcher's narrative is far different than Roth's, the reader is left with very much the same sense of despair regarding this aspect of contemporary academia (and perhaps society) after having read (and lived through) both stories.[8]

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[7] *See* Foundation for Individual Rights in Education, *Academic Freedom under Assault at Columbia Law School; Dean Threatens Criminal Law Professor*, Oct. 4, 2000, http://www.thefire.org/article/130.html (last visited May 16, 2010). Leebron has gone on to become President of Rice University. *See* http://www.professor.rice.edu/professor/President's_Bio.asp?SnID=1387887652 (last visited May 16, 2010). Leebron later readily endorsed the application of notions of "openness and rigid adherence to academic freedom" to *others*. Scott Jaschik, *A Pentagon Olive Branch to Academe*, INSIDE HIGHER ED., Apr. 16, 2008, http://www.insidehighered.com/news/2008/04/16/minerva.

Indeed, *The Bond* has some broader similarity to Roth's parable in that both focus on this persistent issue in the context of a love story (albeit the details of each could not be any more dissimilar), both have a recurring reflection on historical events outside the scope of the characters, and both employ feminist professors as the antagonists. In *The Bond*, however, the love interest is a sophisticated and intelligent colleague (the Dean's wife, in fact) who engages in her affair at the expense of her sometimes horn-adorning, slightly-superior (in credentials and attitude) cuckold. In *The Human Stain*, the paramour, Faunia Farley, is of a different age, status and intelligence than Silk, although similarly statured to her continually-jealous ex-husband, Lester.

NOT SO SIGNIFICANT OTHERS AND OTHER INDIGNITIES

Fletcher further insightfully criticizes legal academia's lack of consistent fidelity to due process when he describes the hiring by Regina Law School of what is not-so-euphemistically referred to in the academy as the "trailing spouse" of a faculty applicant. In *The Bond*, Regina hired the Dean's less significant other—that is, his trailing spouse—in order to secure the more qualified former. I never fully understood the import of this not-so-uncommon practice until one dean, in response to my inquiry about whether a trailing spouse of a particular candidate was of the same quality as the "principal," exclaimed rhetorically: "Are they ever?" Could you imagine suggesting in corporate America that accepting a position would be contingent on the contemporaneous hiring of a spouse or other companion? But in legal academia, this is just one of several examples of unprincipled hiring practices: political ideologies have colored employment decisions; objective criteria of quality have been discounted due to favoritism, cronyism, nepotism, and hiring someone with whom an official is sleeping; and accepted notions of conflict-of-interest recusal have been abused or completely ignored by critical players in the hiring process, to name a few.[9]

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[8] For a further discussion of these issues see Robert Steinbuch, *Racist*, 25 HARV. BLACKLETTER L.J. 199 (2009), *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=625512.

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[9] For further discussion of identity and academic politics in actual practice see Richard J. Peltz, *From the Ivory Tower to the Glass House: Access to De-Identified Public University Admission Records to Study Affirmative Action*, 25 HARV. BLACKLETTER L.J. 181, 185 n.23 (2009) (discussing a "Memorandum from Professor[, and Acting Associate Dean,] Lynn C. Foster, William H. Bowen School of Law, University of Arkansas at Little Rock, to Acting Dean John M.A. DiPippa, William H. Bowen School of Law, University of Arkansas at Little Rock (undated)," which stated that individuals with a certain political/philosophical preference should be excluded from a committee assignment). The committee-assignment memorandum also focused on demographic status of faculty under consideration for committee assignments: "there is only one person [from a particular demographic], although [name redacted] is a [member of a particular demographic] . . . [Also, i]t would be nice to have a [member of a particular demographic]." (Committee-Assignment Memorandum, on file with author). The brazenly exchanged notion that political/philosophical preference should be the basis for administrators to unilaterally exclude faculty from membership on important decision-making bodies is particularly troubling and hypocritical given that academics and others routinely proclaim that the personal views of judicial nominees on issues such as abortion should not be disqualifying. *See, e.g.*, Michael Saul, *Supreme Court Nominee Sonia Sotomayor 'Open,' Will Follow Law on Abortion Issue, Says Friend*, N.Y. DAILY NEWS, May 29, 2009, http://www.nydailynews.com/news/politics/2009/05/29/2009-05-29_supreme_court.html ("[Supreme Court Nominee Sonya Sotomayor] will follow what she thinks is the law on that, and her personal beliefs will not interfere with that analysis because my view of her is that she does not allow her personal beliefs to interfere with her analysis of legal issues."). Similarly, the Missouri Chief Justice, Michael A. Wolff, writes on the Court's official webpage:

> Court opinions are not personal beliefs. Supreme Court opinions are directed at one result: resolving a legal dispute. They do not necessarily reflect any judge's personal views about the subject matter, nor are they pronouncements of political policy. A review of the Court's opinions would show that decisions are based on laws enacted by the General Assembly, previous court decisions, court rules, constitutional provisions or other guiding legal authority. Different judges may differ on what a legal provision means or what legal principle controls a case. An individual judge may write a separate opinion dissenting or concurring with the opinion of the Court; there you may find an expression of one judge's individual views about what a legal provision means or what legal principle should control.
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> . . .

Perhaps Fletcher and I naively single out hiring in legal academia for scolding in the context of broader unfair employment practices still found elsewhere in society, but such behavior in law schools (even though, thankfully, far from universal) puts these actions in painful contradiction to the catechism from which we as educators (of law, no less) preach, i.e., that decisions will be made primarily based upon considerations of merit. I nonetheless still hold onto the belief that for the most part faculty hiring is a merit-based system. Indeed, Fletcher and I have been fortunate enough to secure wonderful positions through the existing system. But, like the antiquated approach to collegiate admissions of "legacy" credit (read: favoritism) still employed at some institutions, it is time to bury certain faculty-hiring practices that unfortunately still crowd out considerations of excellence.

CONCLUSION

Lawyers tend more than most to veer into attempts at literature. They do so, I believe, because the nature of the vocation calls for a facility with language. Regrettably, these attempts produce mixed results. But when one abled advocate is able to combine this skill with a unique and compelling story, the result is refreshing. Fletcher offers us exactly that stimulation in *The Bond.* His behind-the-scenes look into the operation of law schools in the greater context of political and moral struggles takes complex issues and presents them in accessible prose.

> Judges, as other citizens, have personal beliefs. When citizens come to courts to serve as jurors, we instruct them to set aside their persons [sic] beliefs and decide cases based on the law and the facts. The same is true for judges, who take an oath to do just that.

Michael A. Wolff, *Law Matters: What Do Judges Believe . . . Really?*, Feb. 27, 2006, http://www.courts.mo.gov/page.jsp?id=1080. All this is not to say that personal beliefs don't shape the evaluative process. They do. *See generally, e.g.,* Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007); Robert Steinbuch, *An Empirical Analysis of the Influence of Political Party Affiliation on Reversal Rates in the Eighth Circuit for 2008*, 43 LOY. L.A. L. REV. 51, 64-65 (2009). However, as McKee indicates, this is something to be embraced, not used as a basis for exclusion. *Cf.* McKee, *supra*, at 1723-24.

The Bond is a must read for anyone interested in law and justice. It is a singular piece of literature deserving of both academic and popular attention.

COMMENT

SPLITTING THE BABY: WHETHER ERISA-IMPOSED WITHDRAWAL LIABILITY CLAIMS SHOULD BE PRORATED AND GRANTED ADMINISTRATIVE PRIORITY IN BANKRUPTCY PROCEEDINGS

INTRODUCTION

Congress's passage of the Employee Retirement Income Security Act of 1974 (ERISA) created new liability for employers seeking to terminate their involvement with pension plans.[1] Specifically, passage of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) imposed withdrawal liability on employers terminating their involvement with multiemployer plans.[2] Over the years, courts have come to a myriad of different decisions on how to treat this liability in the course of an employer's bankruptcy. The recent increase in business bankruptcy filings combined with the practice of companies unloading their burdensome pension plans in bankruptcy has again brought this issue to light. Recently, two courts considered this controversy and came to opposite conclusions. This article will address the historical treatment of withdrawal liability, the different approaches courts have taken, and the correct approach to upholding the congressional purpose of both the Bankruptcy Code and ERISA.

Before jumping into the complicated issues that arise at the intersection of federal bankruptcy law and ERISA, it is useful to first examine some of the background for these bodies of law. As both ERISA and federal bankruptcy law are sufficiently complex to warrant entire treatises on their own, this article will merely attempt to introduce the aspects of these bodies of law relevant to this issue.

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[1] Employee Retirement Income Security Act of 1974, § 1, 29 U.S.C. § 1001 (2006).

[2] Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (codified at 29 U.S.C. §§ 1381-1461).

I. THE HISTORY AND SCOPE OF ERISA

Congress enacted ERISA in response to findings that the then-existing minimum standards for employee benefit plans were inadequate to secure the plans' soundness and stability, the plans were regularly insufficiently funded to pay accumulated benefits, and the plans often terminated before requisite funds had accumulated—thus depriving the beneficiaries of their anticipated benefits.[3] Congress also found employee benefit plans to substantially affect interstate commerce, federal tax revenues, the national public interest, and that "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans."[4] Congress intended for ERISA to function as a comprehensive scheme, providing a uniform federal standard of regulation for most private employee benefit programs.

Congress's primary purpose in drafting ERISA was "the protection of individual pension rights,"[5] "to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information."[6] Congress implemented this policy by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."[7] Congress also designed ERISA:

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[3] 29 U.S.C. § 1001(a).

[4] *Id.* § 1001a(a)(3).

[5] H.R. REP. NO. 93-533, at 1 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639.

[6] 29 U.S.C. § 1001(b). *See also* Boggs v. Boggs, 520 U.S. 833, 839 (1997) ("ERISA is designed to ensure the proper administration of pension and welfare plans, both during the years of the employee's active service and in his or her retirement years."); Crown Cork & Seal Co. v. Cent. States Se. & Sw. Areas Pension Fund, 982 F.2d 857, 861 (3d Cir. 1992) ("ERISA's central purpose is to protect the security of employee pension plans and to insure that benefits which have vested are paid to employees.") (citing Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984)); Richard A. Ippolito, *A Study of the Regulatory Effect of the Employee Retirement Income Security Act*, 31 J.L. & ECON. 85, 87 (1988) ("Defined benefit pension plans are the primary focus of ERISA . . . .").

> to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.[8]

Through ERISA, Congress also created the Pension Benefit Guarantee Corporation (PBGC), a private government corporation within the Department of Labor, to encourage continuation and maintenance of private pension plans, provide for timely payment of pension benefits, and maintain pension insurance premiums at the lowest level consistent with its legal obligations.[9]

Under ERISA, pensions are typically categorized into two types: "defined benefit" plans and "defined contribution" plans. Defined benefit plans typically provide retired employees with an income that is based on factors such as the employee's salary and years of service.[10] On the other hand, in defined contribution plans, the employer contributes a portion of the employee's wages into a separate account, and the employee is entitled to the balance of this account upon retirement.[11] ERISA further divides defined benefit plans into single and multiemployer plans. Multiemployer plans are those maintained by one or more employee organizations pursuant to a collective bargaining agreement (CBA), and to which more than one employer is required to contribute.[12] ERISA uses a "catch-all" definition for single employer plans: "an employee benefit plan other than a multiemployer plan."[13]

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[7] 29 U.S.C. § 1001(b).

[8] 29 U.S.C. § 1001(c).

[9] 29 U.S.C. § 1302(a).

[10] *See* 29 U.S.C. § 1002(35).

[11] *See* 29 U.S.C. § 1002(34).

[12] 29 U.S.C. § 1002(37)(A).

A. *The Multiemployer Pension Plan Amendment Act of 1980*

Shortly after the passage of ERISA, Congress became aware of problems relating to the treatment of multiemployer plans.[14] Congress amended ERISA through the MPPAA to provide additional protections to these multiemployer plans. Congress's primary purpose in enacting the MPPAA was to "protect retirees and workers who are participants in such [multiemployer] plans against the loss of their pensions."[15]

As originally enacted, ERISA did not require employers withdrawing from a multiemployer plan to pay any compensation for unfunded benefits to the plan.[16] Thus, the result of an employer's withdrawal was to shift the funding burden to the remaining employers in the plan.[17] Liability would only be imposed on a withdrawing employer if the plan terminated within five years, and then only to the extent of thirty percent of the employer's net worth.[18] As a result, Congress found the then-existing rules for withdrawal liability to be "inequitable and disfunctional [sic]."[19] Specifically, Congress found these rules to reward employers who withdrew early from a financially troubled plan, while penalizing the remaining employers.[20] As part of the remedy to this inequity and dysfunction, Congress imposed an obligation on employers to pay pension plans a withdrawal liability for any unfunded vested benefits (UVB) attributable to the withdrawing employer.[21]

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[13] 29 U.S.C. § 1002(41).

[14] H.R. REP. NO. 96-869, pt. 1, at 51 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2919.

[15] *Id.* at 51, *reprinted in* 1980 U.S.C.C.A.N. 2918, 2919.

[16] *Id.* at 60, *reprinted in* 1980 U.S.C.C.A.N. 2918, 2928.

[17] *Id.*

[18] *Id.* at 60-61, *reprinted in* 1980 U.S.C.C.A.N. 2918, 2928-29 ("Termination liability for the unfunded benefits guaranteed by the [PBCG] is imposed on employers who contributed to the plan within 5 years of its termination."). Liability could also be imposed if the withdrawing employer was classified as a "substantial contributor," but even in that case the employer was merely required to provide some type of security to the PBGC for the potential termination liability. *Id.* at 60, *reprinted in* 1980 U.S.C.C.A.N. 2918, 2928.

[19] *Id.* at 60, *reprinted in* 1980 U.S.C.C.A.N. 2918, 2928.

[20] *Id.*

B. Withdrawal Liability

When an employer withdraws from a multiemployer plan, ERISA, as amended by the MPPAA, imposes an obligation on the employer to pay its proportional share of the plan's UVB.[22] For a complete withdrawal, the employer is deemed to have withdrawn on the date that the employer permanently ceases covered operations or is permanently removed of any obligations to contribute to the plan.[23]

Calculating a withdrawing employer's liability is a two-step process.[24] First, the plan calculates the amount of UVB for the entire plan.[25] The MPPAA defines "unfunded vested benefits" as the difference between the present value of the nonforfeitable benefits and the current value of the plan's assets.[26] In the second step, the plan calculates the withdrawing employer's share of the UVB.[27] ERISA sets forth four different methods of calculating the portion of UVB attributable to the withdrawing employer.[28] Three of the four methods (presumptive, modified presumptive, and rolling-5) base withdrawal liability on the proportion of total employer contributions made by the withdrawing employer during the previous five years, ending with the year before the employer's withdrawal.[29] Under the fourth method (direct attribution), the employer is only liable for the UVB directly attributable to it; therefore, the plan must maintain separate records for each employer that participates in the plan.[30] The presumptive method is most commonly used to calculate withdrawal liability.[31]

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[21] *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, §§ 4201, 4203, & 4211 (codified as amended at 29 U.S.C. §§ 1381, 1383, & 1391 (2006)).

[22] CPT Holdings, Inc. v. Indus. & Allied Employees Union Pension Plan, Local 73, 162 F.3d 405, 407 (6th Cir. 1998) (citing 29 U.S.C. §§ 1381, 1391; Concrete Pipe & Prod. v. Const. Laborers Pension Trust, 508 U.S. 602, 608 (1993)).

[23] 29 U.S.C. § 1383(a).

[24] *See* Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 513 U.S. 414, 417 (1995); 29 U.S.C. § 1391.

[25] *See Milwaukee Brewery*, 513 U.S. at 417; 29 U.S.C. § 1391.

[26] 29 U.S.C. § 1393(c) ("For purposes of this part, the term "unfunded vested benefits" means with respect to a plan, an amount equal to—(A) the value of nonforfeitable benefits under the plan, less (B) the value of the assets of the plan.").

[27] *See Milwaukee Brewery*, 513 U.S. at 417; 29 U.S.C. § 1391; *see also* Trs. of Amalgamated Ins. Fund v. McFarlin's, Inc., 789 F.2d 98, 103 (2d Cir. 1986) (stating that withdrawal liability is the employer's "proportionate share of the plan's liability for vested but unfunded benefits attributable to work already performed").

[28] *See* 29 U.S.C. § 1391.

II. THE BANKRUPTCY CODE

The Supreme Court has long held that "[t]he principle purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'"[32] The Bankruptcy Code operates under two central tenets: an equal distribution of assets,[33] and a fresh start for the debtor upon discharge.[34] For the purposes of this discussion, this article will focus primarily on the process of reorganization in bankruptcy. The Bankruptcy Code allows businesses to reorganize and continue operating while undergoing a restructuring of their debts. Chapter 11 of the Bankruptcy Code permits businesses to take advantage of provisions to restructure equity interests and debts. The Supreme Court has stated "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."[35]

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[29] *See* 29 U.S.C. §§ 1391(c)(2)-(3) (2006).

[30] *See* 29 U.S.C. § 1391(c)(4).

[31] 29 C.F.R. § 4211.1(a) (2009) ("With the minor exceptions . . . a plan determines the amount of unfunded vested benefits allocable to a withdrawing employer in accordance with the presumptive method . . . .").

[32] Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286-87 (1991)); *see also* 1 COLLIER ON BANKRUPTCY ¶ 1.01 (16th ed. 2009).

[33] Union Bank v. Wolas, 502 U.S. 151, 161 (1991) ("[T]he preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.") (quoting H.R. REP. NO. 95-595, at 177-78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138).

[34] *Marrama*, 549 U.S. at 367.

[35] NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984); *see also* United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983) ("By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. Congress presumed that the assets of

While it is obvious that the bankruptcy process benefits the debtor, it also provides benefits to creditors. Creditors benefit from an orderly and centralized liquidation, or in the case of reorganization creditors of equal priority receive pro-rata and equitable distributions from the debtor. In order for a debtor to qualify for reorganization, the debtor must pay the creditors at least as much as they would have received in a liquidation.[36] By allowing a business that is worth more as an operating entity than the sum of its liquidated parts to continue operating, the Bankruptcy Code preserves the "going concern" value of the debtor and avoids unnecessary economic waste. Reorganization provides benefits to society in such forms as continued wages and benefits for workers and tax revenues for governments.

A. Administrative Priority

Section 507 of the Bankruptcy Code provides the order and priority by which certain claims and expenses are paid from the assets of the bankruptcy estate.[37] The statute grants first[38] priority to certain administrative expenses incurred after the filing of the bankruptcy petition.[39] Having a first priority simply gives the party the right to be paid before anyone else. In order to qualify as an administrative expense, the claim must arise from "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, and commissions for services rendered after the commencement of the case."[40] The purpose of this provision is to encourage third parties to provide the debtor with goods and services necessary for the debtor to continue operating to the benefit of all creditors.[41] While

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the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.'") (internal citation omitted).

[36] 11 U.S.C. §§ 1129(a)(7), 1225(a)(4), 1325(a)(4) (2006).

[37] *See* 11 U.S.C. § 507 (Supp. 2010).

[38] While § 507(a)(1) gives first priority to claims for domestic support obligations, business Chapter 11 proceedings do not typically involve DSO's; therefore, administrative expenses have a virtual first priority. *See* 11 U.S.C. § 507.

[39] 11 U.S.C. § 507(a)(2).

[40] 11 U.S.C. § 503(b)(1) (2006).

[41] *See* 4 COLLIER ON BANKRUPTCY ¶ 503.06[2] (16th ed. 2009); *see also In re* Jartan, Inc., 732 F.2d 584, 588 (7th Cir. 1984) ("[A]dministrative priority is granted to post-

this provision may be necessary to encourage others to engage in business with the debtor, courts have generally construed section 503(b) priorities narrowly to protect the interests of all creditors in the bankruptcy estate.[42] The test devised to determine whether a claim qualifies for administrative priority is commonly referred to as the "benefit to the estate" test. Under this test, a debt qualifies only if (1) it arises from a transaction with the bankruptcy estate and (2) it provided a direct and substantial benefit to the estate.[43]

III. THE PROBLEM

Having introduced the background material necessary to frame the issue, this article will now introduce the problem as it arises in the context of a Chapter 11 proceeding. When a company that participates in a multiemployer plan withdraws from the plan during the course of a Chapter 11 reorganization, ERISA, as amended by the MPPAA, imposes withdrawal liability for the portion of UVB attributable to the employer. The question for the courts in these cases is what treatment to give the plan's claim for the withdrawal liability. Specifically, whether the withdrawal liability, or a portion thereof, should be treated as an .administrative expense and granted priority. As the following cases illustrate, courts often vary on the correct treatment of these claims.

A. In re *HNRC Dissolution Co.*

In November of 2008, the Bankruptcy Appellate Panel for the Sixth Circuit decided the case *In re* HNRC Dissolution

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petition expenses so that third parties will be moved to provide the goods and services necessary for a successful reorganization.").

[42] *See In re* HNRC Dissolution Co., 396 B.R. 461, 475 (B.A.P. 6th Cir. 2008) ("Because 'priority claims reduce the funds available for creditors and other claimants,' it is well established that '[c]laims for administrative expenses under § 503(b) are strictly construed.'") (quoting City of White Plains, N.Y. v. A & S Galleria Real Estate, Inc. (*In re* Federated Dept. Stores, Inc.), 270 F.3d 994, 1000 (6th Cir. 2001)); *see also* 4 COLLIER ON BANKRUPTCY ¶ 503.06[2] (16th ed. 2009).

[43] *See, e.g.*, *In re* Eagle-Picher Indus., Inc., 447 F.3d 461, 464 (6th Cir. 2006); *In re* DAK Indus., Inc., 66 F.3d 1091, 1094 (9th Cir. 1995); *In re* Jartan, 732 F.2d 584, 587 (7th Cir. 1984).

Co.[44] The debtors in *HNRC* were parties to collective bargaining agreements (CBAs) with the United Mine Workers of America (UMWA).[45] Under these agreements, the debtors were required to participate in "the 1974 plan," a multiemployer defined benefit pension plan.[46] Under the 1974 plan, the debtors' employees accrued pension benefits for every hour they worked.[47] In November of 2002, the debtors filed a voluntary petition for bankruptcy under Chapter 11 and subsequently operated as debtors-in-possession for approximately two years.[48] During the postpetition period, the debtors employed over 1000 UMWA-represented employees, working a combined total of 2,976,962 hours.[49] In 2004, after an unsuccessful attempt to reorganize, the debtors amended their Chapter 11 plans and sold substantially all of their assets.[50] On September 30, 2004, the Chapter 11 plans became effective, resulting in the debtors' rejection of the CBAs and dissolution of the debtors.[51]

The 1974 plan then asserted a claim for withdrawal liability, stating that the debtors' cessation of operations constituted a complete withdrawal from the plan.[52] In calculating the withdrawing employer's liability, the 1974 plan added a third step to the process.[53] After calculating the total UVB in the plan and the portion attributable to the withdrawing employers,[54] the plan determined what portion of the debtors' total withdrawal liability was attributable to postpetition work.[55] To do this, the plan divided the number of postpetition hours worked by the debtors' employees by the total number of hours worked by the debtors' employees in the five years before the withdrawal.[56] The plan then claimed that the portion of the withdrawal liability they attributed to postpetition services should be entitled to administrative priority.[57] After considering briefs on the matter, the bankruptcy court disallowed the 1974 plan's claim for administrative priority holding that the plan failed to demonstrate that the liability on which the claim was based had directly and substantially benefitted the bankruptcy estate.[58]

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[44] *In re* HNRC Dissolution Co., 396 B.R. 461 (B.A.P. 6th Cir. 2008).

[45] *Id.* at 465.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 466.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 467.

[52] *Id.* ERISA states, "complete withdrawal from a multiemployer plan occurs when an employer—(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a) (2006).

[53] *HNRC*, 396 B.R. at 467.

[54] To calculate the withdrawal liability, the plan used a modified version of the rolling-5 method. The plan first calculated the total amount of UVB at the time of the debtors' withdrawal. The plan then divided the hours worked by the debtors' employees during the previous five years by the total hours worked by all plan participant em-

Considering the appeal, the BAP found "the central, and ultimately dispositive" issue to be whether the prorated portion of the debtors' withdrawal liability directly and substantially benefited the bankruptcy estate.[59] Analyzing the issue, the BAP conceded the obvious benefit of the employees' postpetition work and recognized the common application of administrative priority to wages and pension plan minimum funding contributions earned through postpetition services.[60] The BAP

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ployees during the same period. This percentage was then multiplied by the total UVB. The 1974 plan claimed a total withdrawal liability of $224,986,733 as of June 30, 2004. *Id.*

[55] *Id.*

[56] *Id.* ("This calculation resulted in approximately 8.7% of the total withdrawal liability being allocated to the postpetition period.").

[57] *Id.* Lexington Coal, one of the purchasers of the debtors' assets, objected to the 1974 plan's claim, asserting that "the withdrawal liability did not directly and substantially benefit the Debtors' estate." *Id.* at 467-68.

[58] *Id.* at 469. A change in the plan's interest rate assumptions led it to amend its claim for administrative expense. This change in interest rate decreased the total amount of withdrawal liability from $224,986,773 to $138,354,090. *Id.* at 468. However, in the amendment the plan also asserted that the original calculation used an incorrect withdrawal date excluding an entire year. *Id.* The plan asserted the correct percentage of withdrawal liability attributable to postpetition work was not 8.7%, but 26.2%. *Id.* Therefore, the plan increased the administrative expense claim amount from $19,580,146 to $36,248,771. *Id.* The bankruptcy court's determination was based in part on its view that because the interest rate change reduced the amount of withdrawal liability, no additional indebtedness was created during the administration of the debtor's estate. *Id.*

[59] *Id.* at 475.

[60] *Id.* at 476.

even went so far as to state that where Sixth Circuit precedent grants administrative priority to minimum funding contributions, "it seems appropriate to assert that claims for withdrawal liability relating to postpetition work by a debtor's employees should also be entitled to priority status."[61] However, the BAP quickly retreated from this position stating that, under the Sixth Circuit's *CPT Holdings* decision, a claim for withdrawal liability cannot arise prior to the debtor's actual withdrawal from its pension plan.[62] The BAP ultimately concluded that the major issue in the postpetition portion of the withdrawal liability assessed against the debtor "is *always* dependent upon factors that are not directly related to the postpetition work of a debtor's employees."[63]

Based on the influence of these outside factors, the BAP concluded, as a matter of law, that withdrawal liability claims do not have the "requisite causal relationship" to the postpetition work performed by the debtors' employees necessary to be eligible for administrative priority.[64]

B. Trucking Employees of North Jersey Welfare Fund, Inc. v. Marcal Paper Mills, Inc.

One year after the *HNRC* decision, the U.S. District Court for the District of New Jersey heard a very similar appeal and came to a very different conclusion.[65] Like *HNRC*, *Trucking Employees of N. Jersey Welfare Fund, Inc., v. Marcal* involved an employer withdrawing from a multiemployer plan in the process of Chapter 11.[66] Marcal employed truck drivers represented by the Teamsters Union Local 560, and under the CBAs between the parties Marcal was obligated to pay monthly contributions to the pension plan on behalf of the drivers.[67] Marcal commenced Chapter 11 proceedings in November of 2006 and eventually sold its assets and dissolved in May of 2008.[68] Like the debtors in *HNRC*, Marcal made required contributions during the period it operated in Chapter 11, and upon dissolution all parties agreed that Marcal had no remaining obligation to contribute to the plan.[69]

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[61] *Id.* at 477. *But see* discussion *infra* Part IV.C.

[62] *Id.* at 478-79 (citing CPT Holdings, Inc. v. Indus. & Allied Employees Union Pension Plan, Local 73, 162 F.3d 405, 409 (6th Cir. 1998).

[63] *Id.* at 479. The court goes on to list the sources of UVB as a "myriad of factors including interest rate assumptions, the performance of a plan's investments, and other actuarial methods utilized by the plan's sponsors." *Id.*

[64] *Id.* 480-81.

[65] Trucking Employees of N. Jersey Welfare Fund, Inc. v. Marcal Paper Mills, Inc., No. 09-1863 (SRC), 2009 U.S. Dist. LEXIS 101695 (D.N.J. Nov. 2, 2009).

[66] *Id.* at *3-*5.

Upon Marcal's withdrawal, the TENJ Pension Fund calculated Marcal's withdrawal liability to be $5,980,128 and filed an administrative priority claim for the portion they attributed to postpetition work.[70] The bankruptcy court, relying on *HNRC*, reclassified the claim as a general unsecured claim, not eligible for administrative priority.[71]

On appeal, the district court addressed the issue of whether the court should separate the withdrawal liability attributable to postpetition services from the prepetition liability and grant the former administrative priority.[72] Analyzing the issue, the district court noted it was one of first impression for the Third Circuit.[73] After conducting an analysis of the existing law, the court concluded that the Sixth Circuit BAP "miss[ed] the mark by focusing on the manner in which the assessment is computed rather than on the nature of the obligation itself."[74] The court viewed the withdrawal liability as "an acceleration of the employer's obligation to contribute towards the funding of pension benefits accrued by employees pursuant to agreement."[75] Essentially, the court viewed withdrawal liability as bridging the gap between the value of the benefits earned and the amount the employer had previously contributed. Countering the Sixth Circuit BAP's opposition to outside factors affecting the calculus, the district court held, based on the accelerated nature of the obligation, the law's concern with underfunded pensions, and the formula used to calculate the liability, outside factors will of course have some influence.[76] The court reiterated that this is not the dispositive issue, rather it is the character of the withdrawing employer's debt to the fund—"that is, incurred in return for the employees' service to the employer post-petition."[77] The court characterized the withdrawal liability incurred postpetition as nothing more than deferred compensation and stated that to deny administrative priority for these claims, "would in essence give the debtor a free ride on the labor of its employees."[78] The court found this result to be inequitable and "precisely opposite to what the MPPAA intended."[79] Therefore, the court granted administrative priority to the portion attributable to postpetition services, but remanded the case to the bankruptcy court to determine a method of apportioning the liability.[80]

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[67] *Id.* at *3-*4. Marcal did not enter into a new CBA after filing for Chapter 11, but entered into a Memorandum of Understanding with the Local 560 continuing the terms of the CBA pending negotiation of a new contract. *Id.* at *4.

[68] *Id.* at *3-*4.

[69] *Id.* at *4.

[70] *Id.* at *5. TENJ Pension Fund originally asserted a claim for the entire amount as an administrative expense, but after Marcal objected to administrative status, the fund countered by seeking only the portion attributable to postpetition services. *Id.* at *5-*6.

[71] *Id.* at *8.

[72] *Id.* at *7.

[73] *Id.*

[74] *Id.* at *22.

[75] *Id.* at *22-*23.

IV. DISCUSSION

These two cases, decided just a year apart clearly illustrate the confusion courts experience when attempting to determine the treatment of withdrawal liability in bankruptcy. This issue has been frequently litigated after the passage of the MPPAA with surprisingly little progression. Attempting to resolve this issue, this article has analyzed the relevant case law along with the statutory text and legislative history. What this article attempts to do in this section is explain the clear legislative intent and the only workable solution for this issue.

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[76] *Id.* at *23.

[77] *Id.* at *24.

[78] *Id.*

[79] *Id.* at *25.

[80] *Id.* at *27. All parties agreed that there is no settled method of apportioning withdrawal liability. *Id.*

A. *Is a Plan's Claim for Withdrawal Liability a "Claim" for Bankruptcy Purposes?*

In looking at a plan's claim for withdrawal liability, one of the first and most important questions to answer is whether it is a claim for bankruptcy purposes, and if so, when it arises. At least one court has held that in some circumstances it is not a claim.[81] In *CPT Holdings*, the Sixth Circuit held, on somewhat different facts from the above cases, that where the withdrawal occurs eighteen months after confirmation of the Chapter 11 case and had not been contemplated by the employer during the Chapter 11 proceedings, the withdrawal liability is not a "claim" and is not discharged upon confirmation.[82] When an employer has terminated participation in a multiemployer plan prior to or at confirmation of the Chapter 11 plan, courts have virtually always considered the plan's withdrawal liability to be a "claim" for bankruptcy purposes.[83]

B. *Can the Claim be Partitioned?*

The next consideration is whether it is proper, or even possible, to partition a withdrawal liability claim into portions attributable to post and prepetition services. While several courts have recognized the appeal of portioning the claim, few have actually done so.[84]

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[81] *See* CPT Holdings, Inc. v. Indus. & Allied Employees Union Pension Plan, Local 73, 162 F.3d 405, 409 (6th Cir. 1998). In this case, during reorganization, the debtor-in-possession assumed the CBA and thereafter entered into a new CBA with the union. *Id.* at 406. Acknowledging the Bankruptcy Code's broad definition of a "claim," the court nonetheless held that an employer must completely withdraw from a plan prior to confirmation in order to discharge the claim. *Id.* at 409 ("They cannot remain a part of the plan and simultaneously have their withdrawal liability forgiven should they ever decide to withdraw.").

[82] *See id.* at 406, 409.

[83] *See, e.g.*, Trs. of the Amalgamated Ins. Fund v. McFarlin's, Inc., 789 F.2d 98 (2d Cir. 1986); *In re* Pulaski Highway Express, Inc., 57 B.R. 502 (Bankr. M.D. Tenn. 1986); *In re* United Dep't. Stores, Inc., 49 B.R. 462 (Bankr. S.D.N.Y. 1985).

[84] *Compare In re* Cott Corp., 47 B.R. 487, 495 (Bankr. D. Conn. 1984) (dividing the withdrawal claim into prepetition and postpetition amounts, and granting administrative priority to the postpetition amount), *and* Trucking Employees of N. Jersey Welfare Fund, Inc. v. Marcal Paper Mills, Inc., No. 09-1863 (SRC), 2009 U.S. Dist. LEXIS 101695 at *27 (D.N.J. Nov. 2, 2009) (prorating withdrawal liability claim and granting

In drafting ERISA and the MPPAA, Congress never hinted that withdrawal liability is capable of being partitioned or prorated, and as a result no statutory method of partitioning the claim exists.[85] Where courts have allowed a claim to be prorated, the calculation has typically been done as follows: once the employer's withdrawal liability has been determined using one of the methods provided in ERISA,[86] that amount is multiplied by the number of hours the debtor's employees worked postpetition divided by the total hours worked by the debtor's employees in the previous five years.[87] For example, if the debtor's withdrawal liability is determined to be $1,000,000, and the debtor's employees worked 10,000 hours postpetition and 50,000 hours in the previous five years, then one fifth ($200,000) of the withdrawal liability would be attributable to work done postpetition (10,000/50,000 = .2 x $1,000,000 = $200,000). While on its face this formula may have some appeal, it has no basis in law.

C. The Missing Link: The Internal Revenue Code

Understanding the standards governing an employer's obligation to pay minimum funding contributions is central to understanding the correct treatment of the withdrawal liability claims in bankruptcy. These standards are found in the Internal Revenue Code (IRC).[88] Through the IRC Congress created an incentive to entice employers to participate in employee pension and welfare plans. Congress accomplished this by giving employers a tax deduction for funds contributed to these types of plans. Because these benefits are not taxable to the employee, employers are enticed to use benefits as wage substitutes. Since the IRC excludes these benefits from an employee's

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administrative priority to the postpetition amount), *with Pulaski*, 57 B.R. at 508, 510 (recognizing the equity of prorating the withdrawal liability claim, but declining to do so on the record before it).

[85] *See Pulaski* at 510-11 n.17 (noting the ERISA provides four methods of calculating withdrawal liability, none of which were designed to partition the withdrawal liability claim).

[86] *See supra* note 28 and accompanying text.

[87] *See, e.g.*, *In re* HNRC Dissolution Co., 396 B.R. 461, 467 (B.A.P. 6th Cir. 2008).

[88] 26 U.S.C. § 412 (Supp. 2010).

income tax, typically employees would rather receive nine dollars in benefits than ten dollars in income. As a result, these "tax subsidies" on fringe benefits can greatly reduce wage costs for employers. However, to qualify for these lucrative benefits employers must meet the obligations stated in the IRC.

Section 412 of the IRC sets forth the minimum funding standards for multiemployer plans.[89] The IRC divides the minimum funding contributions into two parts: the amount necessary to pay for benefits that are presently accruing, and an additional amount to amortize unfunded liabilities that accrued in the past.[90] Essentially, employers are required, on an ongoing basis, to contribute to the pension plan an amount that covers all presently accruing employee benefits and plan expenses and an amortized amount of previously occurring underfunding.[91] While withdrawal liability and minimum funding requirements may seem similar, it is important to recognize the distinction between the two. Withdrawal liability represents the difference between the plan's UVB and the present value of its assets, in a sense requiring withdrawing employers to settle up.[92] On the other hand, the minimum funding requirements ensure that employers fund both presently accruing benefits and past liabilities as they occur, forcing them to pay as they go.[93] It is also important to note that unlike the minimum funding requirements,[94] withdrawal liability does not derive from the collective bargaining agreements; it "is a product of the MPPAA."[95]

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[89] *Id.*

[90] *See* 26 U.S.C. §§ 412, 431. Although Congress has amended the funding standards many times, the basic structure of the funding requirements is substantially the same as when ERISA was originally passed.

[91] *See* 26 U.S.C. §§ 412, 431; *see also* H.R. REP. NO. 96-869, at 59 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2927 ("Generally the minimum funding standards require that contributions to a plan each year be adequate to pay for benefits accrued in that year (normal cost) plus an amount necessary to amortize unfunded liabilities spread over specified periods of time.").

[92] *See supra* notes 22-31 and accompanying text.

[93] *See supra* notes 89-91 and accompanying text.

[94] *In re* HNRC Dissolution Co., 396 B.R. 461, 465 (B.A.P. 6th Cir. 2008) ("The periodic contribution rates are established through collective bargaining . . . ."); *see also In re* United Dep't. Stores, Inc., 49 B.R. 462, 462 (Bankr. S.D.N.Y. 1985).

Now that all the pieces of the puzzle have been collected, it is possible to analyze how withdrawal liability claims should be treated in bankruptcy. As the dispositive question rests on whether the claims qualify for administrative priority, this article will analyze the claims under the administrative priority standard.

As employers typically continue to make the required contributions up to the point of their withdrawal from the plan,[96] the first step in this analysis is to classify the minimum funding contributions. Since contributions to pension plans are typically seen as wage substitutes and are certainly part of the collective bargaining agreement, there is usually no objection to the employer making these contributions while operating postpetition. Even if an employer does not make these contributions, the Bankruptcy Code has a specific provision granting administrative priority to such a claim.[97] However, a Sixth Circuit case applying this provision held that only the portion of the minimum funding contributions attributable to pension benefits earned postpetition—as opposed to the amortized portion for past underfunding—is eligible for administrative expense priority.[98] Understanding the purpose of administrative priorities and the nature of minimum funding contributions, it is logical that the Bankruptcy Code would grant priority in such a case.

Viewing pensions as wage substitutes, it follows that allowing priority for contributions does in fact encourage parties to work with the debtor postpetition and provide a direct and substantial benefit to the estate in the exact manner as paying regular cash wages. But if administrative priority for minimum funding contribution is sufficient to encourage parties to work with the debtor, we are left with this question: what purpose is served by granting administrative priority to withdrawal liability claims?

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[95] CPT Holdings, Inc. v. Indus. & Allied Employees Union Pension Plan, Local 73, 162 F.3d 405, 407 (6th Cir. 1998); *see also* Trs. of the Amalgamated Ins. Fund v. McFarlin's Inc., 789 F.2d 98, 104 n.2 (2d Cir. 1986).

[96] *See, e.g.*, *HNRC*, 396 B.R. at 466; Trucking Employees of N. Jersey Welfare Fund, Inc. v. Marcal Paper Mills, Inc., No. 09-1863 (SRC), 2009 U.S. Dist. LEXIS 101695, at *4 (D.N.J. Nov. 2, 2009); *In re* United Dep't Stores, Inc. 49 B.R. at 463.

[97] 11 U.S.C. § 507(a)(5) (Supp. 2010).

[98] *In re* Sunarhauserman, Inc., 126 F.3d 811, 819 (6th Cir. 1997); *see also* Columbia Packing Co. v. PBGC, 81 B.R. 205, 210-11 (D. Mass. 1988) (finding debtor's obligation to make periodic contributions to the pension plan was entitled to administrative priority to the extent it arises from services performed postpetition).

The only logical reason for granting an administrative priority to *any* portion of a withdrawal liability claim is to encourage employees to continue working for the debtor by granting priority to the pension benefits they are earning postpetition. The obvious flaw in this reasoning is that the minimum funding requirements have already fulfilled this purpose. By granting administrative priority to the funding contributions, Congress has both encouraged and protected the employees to the full extent necessary to fulfill the purposes of both the Bankruptcy Code and ERISA. Viewing these intersecting bodies of law in their entirety, it is clear that granting an administrative priority to withdrawal liability claims is inconsistent with congressional intent.

D. Congress's Intent

Viewing the legislative history of the MPPAA with an eye towards its implications on bankruptcy sheds additional light on this discussion. In the MPPAA, Congress ordered the PBGC to create a voluntary supplemental insurance program to reimburse multiemployer plans for withdrawal liability claims "which are *uncollectible* because of bankruptcy or similar proceedings involving the employer."[99] Characterizing withdrawal liability as "uncollectable because of bankruptcy" goes a long way in describing Congress's view of the correct treatment of these claims in bankruptcy. It would be inconsistent for Congress to order the PBGC to create a separate plan to allow multiemployer plans to insure against uncollectable withdrawal liability claims if Congress intended for these claims to receive administrative priority. Perhaps a counter argument might be that Congress merely intended to insure against the portion attributable to prepetition services, but this argument fails because Congress never even discussed partitioning withdrawal liability claims and certainly specified no method for doing so. Yet another example is ERISA's provision lowering the amount of withdrawal liability imposed on "insolvent employer[s] undergoing liquidation or dissolution."[100]

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[99] H.R. REP. 96-869, pt. 2, at 31 (1980) (emphasis added), *reprinted in* 1980 U.S.C.C.A.N. 2993, 3020.

The message appears to be consistent; while Congress is using withdrawal liability to discourage participating employers from withdrawing from multiemployer plans, the imposition of withdrawal liability is not universal. It seems clear that Congress designed withdrawal liability as a means of encouragement for employers, and not an entitlement for plans. Anticipating uncollectible withdrawal liability claims, Congress created the supplemental program. By making the supplement program voluntary, Congress gave plans a choice: participate in the program or self-insure against uncollectible withdrawal liability.

Looking at this legislative history and the bankruptcy related provisions, it is clear that Congress did not envision an administrative priority for withdrawal liability claims. Even if Congress had envisioned such treatment, we would not expect to find the priority written into ERISA. As administrative expense priority is a bankruptcy created doctrine, when Congress decides to grant such a privilege it does so by amending the Bankruptcy Code. For example, in 2005, Congress amended section 503(b)(1)(A) of the Bankruptcy Code to provide an administrative expense for certain back pay awards.[101]

Taking a close look at what Congress has done in the Bankruptcy Code with regard to pension related claims further illuminates the issue. As discussed, section 507 gives a first[102] priority to administrative expenses, as defined by section 503.[103] While section 503 makes no specific mention of employee benefit plan contributions or pension obligations, section 507 gives a fifth priority to claims for a limited amount of prepetition contributions to employee benefit plans.[104] Given Congress's explicit mention of pension related claims, one would expect any intended administrative priority for withdrawal liability to show up in either section 503 or 507.

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[100] MPPAA, § 4225(b), 94 Stat. 1208, 1242 (1980) (current version at 29 U.S.C. § 1405(b) (2006)). Congress limited the withdrawal liability for these employers to no more than the sum of fifty percent of the UVB allocable to the employer and the portion of that fifty percent that does not exceed the liquidation or dissolution value of the employer at the commencement of the liquidation or dissolution and after reducing the liquidation or dissolution value by the original fifty percent. *Id.*

[101] Pub. L. No. 109-8, § 329, 119 Stat. 23, 101 (2005).

[102] *See supra* note 38.

Because administrative expense priority is generally narrowly construed, a claim of administrative priority for withdrawal liability must pass a very high bar.[105] While it does seem appropriate that employees should be entitled to an administrative priority for the pension benefits they earn postpetition, where courts have erred is in using administrative priority to give the plans through withdrawal liability what has already been given through the required minimum contributions. Allowing pension plans to receive the employer's required minimum contributions *in addition* to granting administrative priority to a portion of the withdrawal liability claim creates no additional incentive for parties to work with the debtor—the very purpose of administrative priority—and thereby hijacks the bankruptcy process. Decisions like *Marcal* frustrate the Bankruptcy Code's purposes of effecting a successful reorganization and an equitable distribution of assets. Because administrative expenses must be paid before a plan can be approved, this additional expense could keep many large companies from successfully reorganizing. Therefore, allowing the plans to receive this windfall imposes an impermissibly high cost on society.

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[103] 11 U.S.C. § 507(a)(2) (Supp. 2010).

[104] 11 U.S.C. § 507(a)(5). This priority is limited to claims "arising from services rendered within 180 days before the date of the filing of the [bankruptcy] petition or the date of the cessation of the debtor's business, whichever occurs first," and is limited to an amount equal to $10,950 multiplied by the number of employees less the aggregate amount paid to the employees under the 507(a)(4) fourth priority for wages, salaries, commissions, including vacation, severance and sick leave pay earned within 180 days of the filing of the petition, plus the aggregate amount paid by the estate on behalf of the employees to any other employee benefit plan. 11 U.S.C. §§ 507(a)(4)–(5).

[105] *See supra* note 43 and accompanying text.

CONCLUSION

Congress enacted the MPPAA just two years after enacting the Bankruptcy Code.[106] It is hard to believe that Congress could have overlooked the obvious collision course of withdrawal liability and bankruptcy. Viewing the MPPAA and its legislative history, it is clear Congress fully anticipated this collision and went to great lengths to minimize the impact that bankruptcy and employer insolvencies would have on multiemployer pension plans. Foreseeing that withdrawal liability would become uncollectable through bankruptcy, Congress ordered the PBGC to create a supplemental program to reimburse plans that suffer such uncollectible withdrawal liabilities. Participation in the supplemental program was voluntary, giving plan fiduciaries the choice of whether to participate, or whether to self-insure. Had the program been mandatory, one wonders if we would still have an issue to discuss.

The privilege of administrative expense priority falls neatly within the province of bankruptcy law. Its purpose is simple: to encourage others to engage in business transactions with the debtor. Such a provision is unquestionably necessary to provide an effective means to reorganize a debtor. The Bankruptcy Code narrowly construes administrative priorities in order to preserve the value of the estate for all creditors, limiting its use to the actual, necessary costs and expenses of preserving the estate. This priority is limited to expenses arising from a transaction with the estate that directly and substantially benefited the estate. This standard is indeed met by employees earning pension benefits while working for the debtor postpetition, and the employees' claims are fully satisfied by the employer's payment of the minimum required contributions.

Any assertion of administrative priority for a withdrawal liability claim fails for three principal reasons: (1) the calculation has no relation to the amount of benefits the employees earn postpetition, (2) there is no statutorily provided method of partitioning withdrawal liability into prepetition and postpetition amounts, and (3) any claim for the employees' postpetition-earned benefits is properly satisfied through the minimum funding requirements.

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[106] *See* MPPAA of 1980 and Bankruptcy Code of 1978.

Contrary to the *Marcal* court's statement, if courts allow pension plans to receive administrative priority *on top* of the minimum funding contributions, it is the plans that get the free ride, and they are riding on the backs of the creditors.

Michael L. Telford

COMMENT

CALLING AN AUDIBLE: THE EQUAL PROTECTION CLAUSE, CROSS-OVER CASES, AND THE NEED TO CHANGE TITLE IX REGULATIONS

INTRODUCTION

> Some people think football is a matter of life and death. . . . I can assure them it is much more serious than that.[1]

In August 2007, Ivyanne Elborough, a high school girl from Wisconsin, joined the Evansville High School freshman football team.[2] When Ivyanne arrived at school, her safety pads and helmet were stored in the girls' locker room, which forced her to find an administrator daily to unlock the locker room.[3] Even though the football coach had a key that unlocked the girls' locker room, he never unlocked the door for Ivyanne.[4] The coach made students who were late for practice do push-ups as punishment for tardiness.[5] He also provided snacks and the practice schedule in the boys' locker room, where Ivyanne was not permitted to enter, and told Ivyanne, "getting her hair cut to look like a boy was a commitment she was going to have to make to be on the football team."[6] After almost a month of Ivyanne playing on the team, her mother complained to the associate coach, athletic director, and a district administrator about Ivyanne's treatment on the team.[7] The same day her mother complained to school administration, Ivyanne arrived at practice and was unable to find an administrator to unlock the locker room door.[8] Consequently, she went to football practice without protective padding.[9] Without offering to help her find sufficient safety equipment, the football coach gave Ivyanne the option to either participate in drills or watch from the sidelines.[10] Ivyanne opted to participate in drills, which included form-blocking drills, and she consequently fractured her right clavicle.[11]

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[1] Allan Massie, *Only One Winner in Sport Versus Culture*, SUNDAY TIMES, Nov. 5, 2000, at 20 (quoting former Liverpool manager Bill Shankly).

[2] Elborough v. Evansville Cmty. Sch. Dist., 636 F. Supp. 2d 812, 816 (W.D. Wis. 2009).

[3] *Id.* at 816-17.

[4] *Id* at 817.

[5] *Id.*

[6] *Id.* at 817-18.

[7] *Id.* at 817.

Ivyanne's situation falls into an area of sports law called cross-over cases.[12] Cross-over cases are legal claims involving an individual of one gender who wants to play on an athletic team traditionally composed of members of the opposite gender.[13] More than displaying a gender atypical interest in a sport, cross-over cases, like Ivyanne's, are significant because they fall at a crossroads between conflicting federal regulations and constitutional law.[14] The Contact Sports Exemption, a regulation written based on Title IX, allows educational institutions to field sex-segregated teams in contact sports, including football, basketball, and ice hockey.[15] However, the Equal Protection Clause of the Fourteenth Amendment requires that girls, like Ivyanne, be allowed to try out for the team based on their athletic abilities.[16]

This Article focuses on the inefficiency of having a federal regulation allowing education institutions to have exclusionary policies in violation of the Equal Protection Clause. It traces the legislative history of Title IX; the formulation of federal regulations governing Title IX's application to school sponsored athletics, with special attention to the Contact Sports Exemption; and subsequent judicial contributions to Title IX. The Article then examines cross-over cases, their treatment under the Equal Protection Clause, holdings under Title IX private causes of action, and the constitutionality of the Contact Sports Exemption. It further discusses the inefficiency of having a federal regulation that conflicts with the Equal Protection Clause. It concludes with a critical examination of alternatives to the current formulation of the Contact Sports Exemption.

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[8] *Id.*

[9] *Id.*

[10] *Id.* at 817-18.

[11] *Id.* at 818.

[12] Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. 551, 563 (2003).

[13] *Id.*

[14] Most of the cross-over cases examined in this article involve females attempting to try out or play for a male dominated sport. This does not indicate the author's personal feelings about males attempting to play historically female dominated sports. Rather, it is indicative of jurisprudence behind cross-over claims and the goals of Title IX.

[15] 34 C.F.R. § 106.41(b) (2009).

[16] Lantz *ex rel.* Lantz v. Ambach, 620 F. Supp. 663, 665-66 (S.D.N.Y. 1985).

I. THE HISTORY AND DEVELOPMENT OF TITLE IX

Legislative History

Congress enacted Title IX in 1972 to combat sex discrimination in the American educational system by targeting all federally-funded educational institutions.[17] A congressional conference adopted the statute without formal hearing or committee report.[18] Title IX provides in pertinent part: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . . [19] During the congressional conference, one of the areas most greatly affected by the statute—sports and intercollegiate athletics—was barely the subject of debate.[20] In fact, its impact on sports was only mentioned twice.[21] In the years following the passage of Title IX, there were efforts to limit the statute's effects on athletic programs, including Senator John Tower's proposed amendment excluding revenue producing sports from the statute's coverage.[22] As an alternative to the Tower Amendment, Congress passed an amendment sponsored by Senator Jacob Javits, requiring the Department of Health, Education and Welfare (HEW)[23] to prepare and publish regulations implementing Title IX.[24] The Javits Amendment urged HEW to take into consideration "reasonable provisions considering the nature of particular sports."[25]

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[17] David Aaronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 FLA. L. REV. 741, 747-51 (1995). Senator Birch Bayh from Indiana, the sponsor of Title IX legislation, articulated that the purpose of the legislation was to "guarantee that women, too, enjoy the educational opportunity every American deserves." *Id.* at 748 (quoting Senator Birch Bayh). He further highlighted the issue of "sex discrimination that reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales." *Id.* at 750 (quoting Senator Birch Bayh).

[18] *Id.* at 747.

[19] 20 U.S.C. § 1681(a) (2006).

[20] Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1255 (1979).

Administrative Regulations and the "Contact Sports Exemption"

Title IX is a general prohibition against sex discrimination in schools and does not contain any standards for identifying sex discrimination in athletics or in any other context.[26] Therefore, any standards governing the enforcement of Title IX have been developed by HEW.[27] The original regulations issued in 1975 are still effective today under the auspices of the Department of Education.[28] The regulations provide that, "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient . . . ."[29]

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[21] *Id.* at 1255 n.11 (citing 118 CONG. REC.5807 (1972) (Sen. Bayh) (personal privacy to be respected in sports facilities); 117 CONG. REC. 30,407 (1971) (Sen. Bayh) (intercollegiate football and men's locker rooms)). Some scholars point to the content of the debate as Senator Bayh offering assurances that the statute would not affect athletics. EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPERATE IS NOT EQUAL IN SPORTS 103 (2008).

[22] Aaronberg, *supra* note 17, at 751.

[23] The Department of Health, Education and Welfare has since been divided into the Department of Education and the Department of Health and Human Services. *See generally* 20 U.S.C. § 3401-3510 (2000). The Department of Education's Office of Civil Rights (OCR) is responsible for enforcement of Title IX. *Id.* § 3401.

[24] Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 221-22 (2009).

[25] Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1972) (amended 1974).

[26] Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 46 (2000).

[27] *Id.*

[28] *Id.* at 46-47. HEW received 9,700 comments on the proposed Title IX regulation, an unprecedented response. Cohen v. Brown Univ., 101 F.3d 155, 165 n.6 (1st Cir. 1996). Former HEW Secretary Caspar Weinberger reacted, "I had not realized until the comment period that athletics is the single most important thing in the United States."

HEW determined that the equality called for in the Title IX statute does not require allowing for males and females to try out for the same teams.[30] Instead, the Regulations permit schools to have separate-sex sports teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[31] Because most intercollegiate and interscholastic teams are chosen on the basis of competitive skill or are classified as contact sports, most school athletic teams are sex-segregated.[32] Conversely, if one gender has been traditionally excluded from a non-contact sport, members of that gender must be allowed to try out for the team if no team is sponsored for members of the other gender.[33] A large number of interscholastic athletics are defined as contact sports by the Regulations, including, "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."[34] Under the regulations, the dispositive factor determining membership of contact sports teams is gender—not desire to play, ability, speed, or skill.[35]

HEW's reason for including the Contact Sports Exemption is largely unknown to the public because the Department of Education, the agency assuming HEW's enforcement of Title

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Id. (citing Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 40 (1977)).

[29] 34 C.F.R. § 106.41(a) (2009).

[30] Brake, *supra* note 26, at 47.

[31] 34 C.F.R. § 106.41(b).

[32] Brake, *supra*, note 26, at 47 n.154.

[33] 34 C.F.R. § 106.41(b).

[34] *Id.* Many opponents of the Contact Sports Exemption call into question the motives behind including basketball as a contact sport. *See* Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 396-97 (2000). Some even point to its inclusion as a contact sport as a revitalization of Senator Tower's proposed Title IX amendment, excluding revenue producing sports from falling within the parameters of Title IX. *Id.* at 397.

[35] Sangree, *supra* note 34, at 391; 34 C.F.R. § 106.41(b).

IX, destroyed HEW's administrative dockets and files containing comments and communications regarding the Title IX Regulations and Policy Interpretation in 1985 and 1989.[36] The Congressional Hearings on the regulation also fail to explain the Contact Sports Exemption's inclusion in the Regulations.[37] When addressing Congress to introduce HEW's 1975 Regulations, HEW's Secretary Weinberger stated:

> With regard to athletics . . . let's look first at what the regulation does not require because there seems to be a substantial misunderstanding about that. . . . [I]t does not require women to play football with men; . . . it will not result in the dissolution of athletic programs for men; . . . and it does not mean the National Collegiate Athletic Association (NCAA) will be dissolved and will have to fire all of its highly vocal staff.[38]

Secretary Weinberger's statement suggests that the Contact Sports Exemption is an accommodation to parties who wanted athletics to be exempt from Title IX entirely or who wanted revenue producing sports to be excluded.[39]

The regulations also contain an "Equal Opportunity" subsection which provides, "A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."[40] The regulations delineate a non-comprehensive set of ten guidelines to determine whether there are equal opportunities available which include:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of

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[36] Sangree, *supra* note 34, at 416.

[37] *Id.*

[38] *Id.* (quoting *Sex Discrimination Regulations, Hearings before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor*, 94th Cong. 438-39 (1975) (statement of Caspar W. Weinberger, Sec. of Dept. of Health, Educ. and Welfare)).

[39] Sangree, *supra* note 34, at 416.

[40] 34 C.F.R. § 106.41(c) (2009).

> coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.[41]

In 1978, HEW attempted to clarify the obligations of federal aid recipients under Title IX by issuing a Policy Interpretation.[42] The Policy Interpretation provided that equivalent female contact sports teams must be offered when there is sufficient interest, ability, and a reasonable expectation of competition exists.[43] The Policy Interpretation also set out three tests[44] to determine whether a school's sports program effectively satisfies Title IX.[45] Compliance with any one of the three tests is sufficient.[46]

The first test is a "substantial proportionality" test.[47] The "substantial proportionality" test asks whether "participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."[48] The second test is met if the institution can show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the underrepresented] sex."[49] The third test questions "whether it can be demonstrated that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."[50]

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[41] 34 C.F.R. § 106.41(c)(1)-(10).

[42] Cohen v. Brown Univ., 101 F.3d 155,166 (1st Cir. 1996).

[43] 44 Fed. Reg. 71,417-18 (C)(4)(a)(1)-(2) (Dec. 11, 1979).

[44] Although the regulations and the Policy Interpretation often reference "intercollegiate athletics," courts have interpreted them to apply to interscholastic athletics. McCormick *ex rel.* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 290 (2d Cir. 2004).

[45] Sangree, *supra* note 34, at 392.

[46] *Id.*

[47] 44 Fed. Reg. 71,418 (5)(a)(1); *see also Cohen*, 101 F.3d at 166 n.7.

[48] 44 Fed. Reg. 71,418 (5)(a)(1). HEW issued no official "benchmark" to determine an acceptable disparity between enrollment and sports participation, leaving courts to determine whether or not this test is satisfied. Sangree, *supra* note 34, at 392; *Cohen*, 101 F.3d at 176 (determining a disparity of 13.01% is too great); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993) (determining a disparity of 10.5% was too great).

[49] 44 Fed. Reg. 71,418 (5)(a)(2).

Under the statute's provisions, all violations of Title IX are investigated by the Department of Education (DOE), through which male or female student-athletes can file complaints.[51] If the DOE finds that there has been a violation of Title IX, then the Department can informally resolve the situation.[52] However, if the problem cannot be solved through informal intervention, then the DOE has the power to convene an administrative hearing and take away the institution's federal funding.[53]

Title IX Development in the Courts

Title IX does not contain a provision allowing a private cause of action for sex discrimination in athletics.[54] Instead, it contains guidelines for administrative enforcement of the statute's schemes.[55] In 1979, the Supreme Court addressed whether a judicial remedy exists outside of the DOE's administrative framework.[56] The Court ruled that there is a right to a private cause of action under Title IX.[57] To infer a private cause of action in Title IX violations, the Court cited Congress's desire to "avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices."[58] However, it took the Court more than a decade to decide whether the private cause of action extended exclusively to injunctive relief or also included damages.[59]

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[50] 44 Fed. Reg. 71,418 (5)(a)(3). The First Circuit has found that the third test poses an almost insurmountable burden of proof on the educational institution. Sangree, *supra* note 17, at 392; *Cohen*, 101 F.3d at 179 (finding that any lack of interest or ability can be attributed to a lack of opportunity or experience).

[51] 34 C.F.R. § 106.71(b) (2009) (adopting enforcement procedures found in 34 C.F.R. § 100.6-100.11 and 34 C.F.R. § 101).

[52] *Id.* § 100.8(a).

[53] *Id.* § 100.8.

[54] Anne-Marie Harris & Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Educational Amendments of 1972 for Student and Faculty Sexual Harassment*, 8 AM. U. J. GENDER SOC. POL'Y & L. 575, 584 (2000).

[55] *Id.*

[56] Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

[57] *Id.* at 717.

[58] *Id.* at 704.

In *Franklin v. Gwinnett County Public Schools*, the Court decided that the right to monetary damages could be inferred by courts in Title IX private causes of action.[60] The Supreme Court has since stipulated that the private cause of action exists when an educational institution, such as a school district, has a discriminatory policy or the school district has "actual notice" and is "deliberately indifferent" toward discriminatory conduct of its employees.[61] Although there is some disagreement among the circuits, the majority of courts hold that because Title IX applies to institutions receiving federal aid, a private cause of action cannot be brought against an individual.[62]

At least one lower court attempted to award punitive damages in a Title IX private cause of action.[63] However, the Fourth Circuit, the highest court to rule on the matter, held punitive damages are not recoverable in Title IX private causes of action—reversing the lower court.[64]

II. THE HISTORY AND DEVELOPMENT OF THE EQUAL PROTECTION CLAUSE

Title IX is not the only federal provision addressing sex discrimination. Many forms of gender discriminatory conduct are barred by the Equal Protection Clause of the Fourteenth Amendment.

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[59] Harris & Grooms, *supra* note 54, at 585.

[60] 503 U.S. 60, 73 (1992).

[61] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998); *see also* Elborough v. Evansville Cmty. Sch. Dist., 636 F. Supp. 2d 812, 818 (W.D. Wis. 2009).

[62] *See* Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1018, 1034 (7th Cir. 1997) (holding individuals cannot be defendants in Title IX private causes of action). *Contra* Mennone v. Gordon, 889 F. Supp. 53, 56 (D. Conn 1995) (holding that an individual can be sued if he or she exercised a sufficient level of control over the discriminatory program or activity); Mann v. Univ. of Cincinnati, 864 F. Supp. 44, 47 (S.D. Ohio 1994) (holding that a claim can be brought against an educational program and its officials).

[63] Heckman, *supra* note 12, at 565 (discussing Mercer v. Duke Univ., 32 F. Supp. 2d (M.D.N.C. 1998)).

[64] *Id.* at 565-66.

Background

The Thirteenth Amendment, passed in 1865 after the end of the Civil War, abolished the institution of slavery within the United States.[65] However, there was immediate resistance to the abolition of slavery in the South.[66] Southern politicians undermined the impact of the Thirteenth Amendment by passing "Black Codes," laws which deprived newly-freed slaves of legal, civil, and political rights and encouraged the use of terror tactics against African Americans.[67] In order to enforce the guarantees of the Thirteenth Amendment and curtail the enforcement of "Black Codes," Congress passed the Civil Rights Act of 1866.[68] Soon after, the constitutionality of the Act was challenged.[69] In order to insulate the act from repeal, Congress drafted the Fourteenth Amendment; and the states ratified it.[70]

In pertinent part, the Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[71] The Fourteenth Amendment was the brainchild of Reconstruction Republicans who aspired for Federal citizenship to be a guarantee of uniformity of fundamental rights throughout the states.[72]

Judicial Expansion of the Equal Protection Clause and Gender Discrimination

While Congress originally enacted the Fourteenth Amendment to address postbellum racial inequalities, it has since been extended by the Courts to address gender discrimination.[73]

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[65] U. S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[66] Samuel Estreicher, Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 451-52 (1974).

[67] *Id.* at 452.

[68] *Id.*; *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[69] Estreicher, *supra* note 66, at 452.

[70] *Id.*

[71] U.S. CONST. amend. XIV, § 1.

[72] Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 719 (2003).

However, the Supreme Court did not interpret gender to be within the protection of the Equal Protection Clause immediately after the Fourteenth Amendment was enacted. When the Court first addressed the subject of gender inequality under the Equal Protection Clause in *Bradwell v. Illinois*, it declined to extend Fourteenth Amendment protections to a woman who was seeking to become a lawyer in Illinois.[74] The Court employed a rational basis standard to determine that bar membership is not one of the Constitutional guarantees of citizenship.[75] It was not until *Reed v. Reed* in 1971 that the Court recognized a successful Equal Protection claim for gender discrimination.[76] The Court overturned an Idaho law that required males be preferred as administrators of estates over equally qualified females.[77] The Court found that the capricious preference for males under the statute reflected "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."[78] The Court established a "substantial relationship" test for gender discrimination cases finding that government acts must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[79]

While the Supreme Court has extended the Equal Protection Clause to gender discrimination claims, the standard of review for gender claims is still not as high as the standard of review for racial discrimination claims.[80] The current standard for evaluating equal protection claims is an "Intermediate Scrutiny" test.[81] In Equal Protection cases, the state is burdened with showing that the discriminatory provision is "substantially related" to an "important governmental objective[]."[82] Furthermore, the state's action must be "free of fixed notions concerning the roles and abilities of males and females."[83]

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[73] *See generally* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

[74] 83 U.S. 130 (1872). Justice Bradley found that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (Bradley, J., concurring).

[75] *Id.* at 132.

[76] Reed v. Reed, 404 U.S. 71 (1971).

[77] *Id.* at 73.

[78] *Id.* at 76.

[79] *Id.* (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

[80] *See generally* United States v. Virginia, 518 U.S. 515, 532 (1996) ("Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men)").

Private Causes of Action Under the Equal Protection Clause

The Constitution does not contain a right to a private, civil cause of action for violations of Constitutional rights. The postbellum Congress that enacted the Thirteenth, Fourteenth, and Fifteenth Amendments, also recognized that former slaves' newly secured rights would be much safer if they had a way to address alleged violations of their Constitutional rights in the American court system.[84] Consequently, Congress passed the Ku Klux Klan Act, inventing "a civil cause of action for violations of citizens' 'rights, privileges, or immunities secured by the Constitution,'" to curtail the Klan from harassing former slaves and Southern Republicans.[85] The Ku Klux Klan Act was the precursor to the modern statute, 42 U.S.C. § 1983, that creates a private, civil cause of action for Constitutional violation.[86]

The current formulation of § 1983 protects any citizen of the United States from "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[87] A female student bringing an Equal Protection sex discrimination claim under § 1983 must tailor her case to show "she did not have opportunities afforded to her on account of gender."[88] The Equal Protection Clause only bars overt or intentional discrimination.[89] In order to succeed with an Equal Protection claim, a plaintiff must prove that his or her gender classification, under the rules in question causes them to receive unequal, unfavorable treatment compared to members of the opposite gender.[90] Again, the use of unequal treatment can be constitutionally justified by showing the action was substantially related to an important government interest.[91]

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[81] *Id.* at 533.

[82] *Id.* (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)); Blake J. Furman, Note, *Gender Equality in High School Sports: Why There Is a Contact Sports Exemption to Title IX, Eliminating It, and a Proposal for the Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1169, 1178-79 (2007).

[83] *Hogan*, 458 U.S. at 724-25.

[84] Daniel J. Lynch, Comment, *Compensatory Damage Awards in Section 1983 Actions Based on Federal Statutory Violations*, 34 WAYNE L. REV. 1373, 1375 (1988).

[85] *Id.* (quoting Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13).

[86] *Id.*; 42 U.S.C. § 1983 (2006).

[87] 42 U.S.C. § 1983.

Unlike Title IX private claims, § 1983 causes of action are available to litigants where the defendant is propelled by evil intent or motivation or has reckless or callous disregard for constitutional protections.[92] Punitive damages can be awarded at the judge's discretion to deter further violations of constitutional rights or punish particularly egregious behavior.[93] Furthermore, another major difference between Title IX private causes of action and § 1983 claims is that Title IX private causes of action can only be brought against institutions receiving federal funding and § 1983 claims can be brought against offending individuals and municipalities.[94]

§ 1983 Claim Preemption

If a lawsuit asserts a § 1983 claim and another federal statute has a private cause of action addressing similar subject matter, the courts must determine if the claim provided by federal law preempts the 1983 claim.[95] If the 1983 claim is "virtually identical" to a constitutional right protected by the federal statute and Congress intended the federal statute to be the sole avenue of redress, then the 1983 claim is preempted.[96]

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[88] Kimberly Capadona, Comment, *The Scope of Title IX Protection Gains Yardage as Courts Continue to Tackle the Contact Courts Exception*, 10 SETON HALL J. SPORT L. 415, 426 (2000).

[89] *Id.* (citing Washington v. Davis, 426 U.S. 229, 238-39 (1976)).

[90] *Id.* at 427.

[91] United States v. Virginia, 518 U.S. 515, 533 (1996).

[92] *See* Santiago v. Garcia, 821 F.2d 822, 829 (1st Cir. 1987).

[93] *See* Creamer v. Porter, 754 F.2d 1311, 1320 (5th Cir. 1985).

[94] *See generally* Diane Mishra, Note, *When the Interests of Individuals and Municipalities Diverge: Municipal Dual Representation and Conflicts of Interest in § 1983 Litigation*, 119 YALE L.J. 86, 92 (2009); Aaronberg, *supra* note 17, at 247-51.

[95] Smith v. Robinson, 468 U.S. 992, 1008-09 (1984).

Until 2009, there was an equal split between the circuits regarding whether private causes of action preempt § 1983 claims.[97] Preventing further confusion surrounding Equal Protection claims and Title IX, the Supreme Court found that Title IX does not specifically address private causes of action and that the remedies provided under Title IX are not as strictly enforced, restrictive, or carefully tailored as other statutes where § 1983 claims are precluded.[98] Therefore, the Supreme Court held that § 1983 sex discrimination claims are not preempted by Title IX private causes of action.[99]

III. CROSS-OVER CASES: CONTRADICTIONS BETWEEN TITLE IX REGULATIONS AND THE EQUAL PROTECTION CLAUSE

Cross-Over Cases

Title IX has had an astronomical impact on increasing the amount of women participating in athletic programs.[100] Fewer than 300,000 women participated in athletic programs in 1971, or approximately one in twenty-seven.[101] By 1998-1999, the number of females participating in sports had increased to 2.6 million, or approximately one in three.[102] However, Title IX regulations assume that males and females will have an equal interest in equivalent sports.[103] They perpetuate a presumption that men and women will be "equally eager to kick a soccer ball or wield an oar."[104] However, what if their interests do not match up?

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[96] *Id.* at 1009.

[97] *See* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 232 (2005) (citing the Second, Third, and Seventh Circuits who found the claims were preempted and the Sixth, Eighth, and Tenth Circuits who found the claims were not preempted).

[98] Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 795 (2009).

[99] *Id.* at 798.

[100] JESSICA GAVORA, TILTING THE PLAYING FIELD, 34 (2002).

[101] Brake, *supra* note 26, at 15.

[102] *Id.*

[103] GAVORA, *supra* note 100, at 6.

[104] *Id.*

Some school districts have tried to avoid the issue presented in cross-over cases by arguing that "[i]t makes no difference that there might be a few girls who wish to play football."[105] Conversely, and perhaps more importantly, courts have disagreed, stating that it does make a difference if even one boy wants to try out for field hockey or one girl wants to try out for football.[106] The crux of the issue presented in cross-over cases originates in the Title IX regulations that permit sex-segregated teams when the sport involved is a "contact sport."[107] It is important to note that under Title IX, schools get to decide "whether co-educational participation in a contact sport will be permitted."[108] Moreover, while a school can decide to exclude males or females from contact sports, the regulations do not dictate it. The intersection between the Contact Sports Exemption and the Equal Protection Clause has been one of the most highly litigated aspects of Title IX.[109]

Force and Equal Protection Claims

Nichole Force was an athletic eighth grader enrolled in Pierce City Junior High School, a public school in Missouri.[110] Force, who had previously played football on her elementary school team, wanted to try out for the school's seventh grade football team.[111] Nichole's mother approached school officials and petitioned the school board for the opportunity for Nichole to go out for the team.[112] The school board denied the Forces' request, citing the potential risk for girls' safety playing football, the possibility that other girls might try out for the team, the potential for boys wanting to go out for the girls' volleyball team, and administrative difficulties of allowing a girl to play on a boys' team.[113] After the school board's second meeting, Nichole's mother filed suit for injunctive relief to allow Nichole to try out for the team on the basis of an Equal Protection claim.[114]

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[105] Lantz *ex rel.* Lantz v. Ambach, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (quoting Attorney General's Brief).

[106] *Id.*

[107] Heckman, *supra* note 12, at 563.

[108] Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1025 (W.D. Mo. 1983) (citing Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 655-56 (6th Cir. 1981)).

[109] Heckman, *supra* note 12, at 563.

[110] *Force*, 570 F. Supp. at 1021, 1022-23.

[111] *Id.* at 1022.

[112] *Id.* at 1023.

Football is the quintessential "contact sport" typically played by males.[115] It involves very strenuous direct contact between players that can be very dangerous, regardless of gender.[116] Given the heightened physicality of football as compared with many other sports, it provides a "litmus test" for constitutionality claims as they relate to the Contact Sports Exemption.[117] Thus, if sex-segregating a highly dangerous contact sport such as football is found to be unconstitutional, then the same prohibitions in less physical sports such as soccer, baseball, or basketball apply. [118] Between 1974 and 1999, courts have reviewed five prominent cases involving the exclusion of girls from football teams based solely on their gender, and in all five cases, the courts have upheld the girls' Equal Protection claims.[119]

Force held that the school's justification for uniformly excluding all female students from the football team was unconstitutional.[120] Furthermore, while Force was not granted a constitutional "right to try" to play football, the court found that she had the right to try to succeed according to her abilities.[121] The ruling clarified that if the goal of the school offering athletic programs is to maximize educational and athletic opportunities for all students, then it was absurd to deny girls the chance to try out for the eighth grade boys' football team.[122] The judge in *Force* further articulated that in identifying an important governmental objective to satisfy the intermediate scrutiny test, "Care must be taken in ascertaining whether . . . the objective itself reflects archaic and stereotypic notions. Thus if the . . . objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[123]

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[113] *Id.*

[114] *Id.* at 1022.

[115] MCDONAGH & PAPPANO, *supra* note 21, at 125.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* at 128.

[120] Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1031-32 (W.D. Mo. 1983).

[121] *Id.* at 1031.

[122] *Id.* at 1025-28.

Even with the victories under the Equal Protection Clause, there is very little consistency amongst jurisdictions about the rights granted under cross-over claims.[124] Even within the same jurisdiction, there are inconsistent standards of review for cross-over claims.[125] Some courts have ruled that it is unconstitutional to deny girls access to try out for boys' sports teams, and other courts have held that girls must be allowed to play on boys teams whenever they want, regardless of ability.[126]

Safety of Female Students as an Important Governmental Objective

Throughout the jurisprudence of cross-over claims, the most commonly used justification for excluding women from contact sports is to protect them from injury.[127] In other words, in order to protect female students from getting injured, they must be excluded from playing.[128] Of note, women's allegedly inferior biology and subsequent need for protection were also used as justification for excluding women from non-contact sports prior to the passage of Title IX.[129] In *Force*, the court found that ensuring the safety of the sport for all of the student participants qualified as an important governmental objective.[130] The judge in *Force* recognized, given physiological considerations, the "typical" 13 year-old-girl might be more prone to injury from football than the "typical" 13 year-old-boy.[131] However, the judge rejected the notion that all 13 year-old-girls, especially Nichole Force, fit within the label of what is "typical."[132] The court also pointed out that the school district did not apply the "safety factor" to males.[133] While the Supreme Court has yet to address the issue of protecting the safety of women in sports specifically, the highest federal court to hear a case using safety of the participants involved, the First Circuit, held that protecting girls from injury was not a sufficient reason to exclude them from Little League baseball.[134]

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[123] *Id.* at 1024. (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

[124] Tracy J. Johnson, Comment, *Throwing Like a Girl: Constitutional Implications of Title IX Regarding Gender Discrimination in High School Athletic Programs*, 18 N. ILL. U. L. REV. 575, 577 (1998).

[125] *Id.*

[126] *Id.* at 577-78.

[127] Sangree, *supra* note 34, at 421.

[128] *Id.*

[129] *Id.* at 425.

[130] Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1028 (W.D. Mo. 1983).

Men's Equal Protection Claims

While women have had great success as plaintiffs for Equal Protection claims, men who bring the same claims in order to try out for a women's sports team are often rejected.[135] School districts and other educational institutions have been able to defend exclusionary practices of men based on gender by citing the creation of "sports opportunities for women" as the important governmental objective.[136] Assertions of biological differences and generalizations about the strength of a typical male versus a typical female are more readily accepted in male Equal Protection cases.[137] Schools have also been able to successfully argue that given biological differences, men would soon dominate women's sports teams if they were allowed to try out on a competitive basis.[138] These defenses to discriminatory policies have been championed by school districts to exclude boys from playing on girls' field hockey and volleyball teams.[139]

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[131] *Id.* at 1028.

[132] *Id.* at 1028-29.

[133] *Id.* at 1029.

[134] Fortin v. Darlington Little League, Inc., 514 F.2d 344, 350-51 (1st Cir. 1975).

[135] Furman, *supra* note 82, at 1179.

[136] *Id.*

[137] B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1127 (2002).

[138] *Id.*

[139] *See* Kleczek *ex rel.* Kleczek v. R.I. Interscholastic League, Inc., 768 F. Supp. 951, 956 (D.R.I. 1991) (upholding a boy's exclusion from a field hockey team); Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979) (upholding a boy's exclusion from a volleyball team).

Title IX and Cross-Over Cases

Taking into account the immense amount of court victories women have garnered in cross-over cases based on Equal Protection claims, assertions based on Title IX are almost never included.[140] However, given the judicially created right to a Title IX private cause of action, some petitioners have opted to include Title IX questions and claims in their law suits.[141]

Courts have been very clear that the sex-segregation of contact sports provided for in Title IX regulations is discretionary, not mandated. The school district in *Force* attempted to defend their exclusionary regulations based on the practice's conformity with Title IX.[142] The court emphasized that the Contact Sports Exemption is permissive and is not a mandate dictating exclusionary actions and practices.[143]

The Fourth Circuit held that the Title IX Contact Sports Exemption permits the exclusion of women in cross-over cases even when they have demonstrated the athletic ability to compete.[144] Sue Mercer became the first female member of the Duke football team.[145] Despite making the team, participating in practice drills, and being listed on the team roster, Mercer was prevented from attending the team's summer training camp, was not allowed to dress in a uniform for games, and was prohibited from sitting on the team's sidelines during games.[146] The next season, Duke's coach cut Mercer from the team.[147] Mercer alleged that she was cut for the sole reason of her gender because less talented male walk-on kickers were allowed to remain on the team.[148] The Fourth Circuit concluded that the Contact Sports Exemption would have allowed Duke to exclude Mercer from the team, even though she had demonstrated the ability to play.[149] However, once she was allowed to compete on the team, she could no longer be excluded or discriminated against on the basis of gender.[150]

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[140] *See* Johnson, *supra* note 124, at 577 (noting that the majority of court rulings are under the Equal Protection Clause).

[141] *See* Lantz *ex rel.* Lantz v. Ambach, 620 F. Supp. 663, 664 (S.D.N.Y. 1985).

[142] Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1024 (W.D. Mo. 1983).

[143] *Id.* at 1024-25.

[144] *See* Mercer v. Duke Univ., 190 F.3d 643 (4th Cir. 1999).

[145] *Id.* at 645.

[146] *Id.*

[147] *Id.*

[148] *Id.*

Equal Opportunity

A section of Title IX that might be fruitful in cross-over claims litigation is the "Equal Opportunity" subsection which provides, "A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."[151] Despite the fact that the C.F.R. Regulations have been in effect for over 30 years, of the ten Equal Opportunity guidelines,[152] litigation has centered almost exclusively around the first provision which focuses on "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."[153] One could argue, taken the guidelines as a whole, that a particular athletic program does not provide an "Equal Opportunity" to members of both genders by denying them access to cross-over sports, even though the regulations say separate teams for separate genders does not necessarily mean the school is noncompliant. However, the regulations imply that schools should offer, at least, equivalent sports teams.

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[149] *Id.* at 647-48. The Court stated:

> We therefore construe the second sentence of subsection (b) as providing that in non-contact sports, but not in contact sports, covered institutions must allow members of an excluded sex to try out for single-sex teams. Once an institution has allowed a member of one sex to try out for a team operated by the institution for the other sex in a contact sports, subsection (b) is simply no longer applicable, and the institution is subject to the general anti-discrimination provision of subsection (a).

Id.

[150] *Id.*

[151] 34 C.F.R. § 106.41(c) (2009).

[152] *See supra* note 41 and accompanying text.

[153] 34 C.F.R. § 106.41(c)(1); Heckman, *supra* note 12, at 566-67.

Courts Determinations on the Constitutionality of the Contact Sports Exemption

While courts have been keen to grant Equal Protection claims to female athletes, they have been slow to rule that the Contact Sports Exemption is unconstitutional.[154] One of the few cases to question the constitutionality of the Contact Sports Exemption is *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association.*[155] In stark contrast to most school districts dealing with cross-over cases, Yellow Springs School District encouraged their teams to be coed, deciding that mixed sex teams provide educational advantages over sex-segregated teams.[156] In violation of the Ohio High School Athletic Association's (OHSAA) disallowance of coed teams for contact sports, two girls at Yellow Springs middle school joined the boys' basketball team.[157] However, the girls who made the team were not allowed to participate.[158] If Yellow Springs attempted to recruit girls for the boys' basketball team, they would be prohibited from participating in interscholastic competitions by OHSAA.[159] Fearing compliance with OHSAA's rules would conflict with federal law and put its federal funding in jeopardy, the school district filed a lawsuit.[160]

The District Court judge ruled that OHSHAA's regulation and the Contact Sports Exemption were unconstitutional and a violation of substantive due process.[161] He asserted that exclusion of female students from football robbed them of their personal choice in matters of "education and acquisition of knowledge."[162] The judge acquiesced that sex-segregated teams are constitutional if they allow for due process concerns.[163] However, he emphasized the constitutionality of sex-segregated teams cannot be used as an excuse to exclude qualified girls from contact sports teams.[164] Insofar as the Equal Protection Clause, the District Court found that the Title IX regulation's exclusion of girls from football based on gender alone was both unfair and contradictory to the personal rights guaranteed by the Fourteenth Amendment.[165]

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[154] George, *supra* note 137, at 1127.

[155] 647 F.2d 651 (6th Cir. 1981).

[156] *Id.* at 652.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 443 F. Supp. 753, 758 (S.D. Ohio 1978) (quoting Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

The Sixth Circuit reversed the District Court alleging that the judge assumed without examination that the OHSAA rule and the Title IX regulation were identical.[166] The court of appeals asserted that the rules of OHSAA do not comply with Title IX.[167] The OHSAA regulation prohibits girls from participating on a boys' team in any contact sport at all levels.[168] Title IX is permissive and flexible on whether or not girls can play on boys' contact sports teams, rather than mandatory.[169] The majority of the court implied that the Title IX regulations are less offensive to the Constitution because they are permissive.[170]

Critics of the *Yellow Springs* decision point out that by allowing schools to permissively decide whether or not to sex-segregate allows .sports to exist outside of the equality contemplated by the Title IX statute.[171] Moreover, institutions that provided cause for the passage of Title IX by discriminating against students on the basis of gender are further allowed to decide how to promulgate policies to further exclude and sex-segregate students on the basis of sex.[172]

Another example comes from a New York case. Because there was no girls' football team at her school, Jacqueline Lantz sued to be allowed to try out for the junior varsity boys' team.[173] In addition to her Equal Protection claims, she brought a Title IX claim against the state Department of Education, crying foul over a regulation that provided: "There shall be no mixed competition in the following sports: basketball, boxing, football, ice hockey, rugby and wrestling."[174] The district court held that not allowing girls to try out for boys' teams is not a violation of Title IX.[175] However, some legal scholars have criticized the court for not making the next logical step by holding that Title IX regulations per se allow gender to be the basis for excluding girls from sports such as football.[176] Consistent with other female cross-over cases, the court found that the Equal Protection Clause allowed Lantz to try out on the basis of her ability.[177]

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[163] *Id.*

[164] *Id.*

[165] *Id.* at 759.

[166] *Yellow Springs*, 647 F.2d at 656.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *See id.*

[171] Sangree, *supra* note 34, at 396.

[172] Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133, 165 (2005).

III. THE GREAT INEFFICIENCY

Regardless of one's personal views on gender equality in sports, the Contact Sports Exemption does not work properly. If the Equal Protection Clause prohibits denying opportunities to women or men based solely on their gender, then a congressional regulation that perpetuates that discrimination should be struck down by courts or changed.[178] Even though courts have not held that the Regulation is patently unconstitutional, women have an established constitutional right to try out for contact sports teams on the basis of ability—a right that is often neglected by the current formulation of the Title IX regulations.[179]

Moreover, forcing federal courts to provide injunctive relief to students denied the right to try out for sports teams based on policies in precise conformity with federal regulations is the height of inefficiency and absurdity.[180] Congress gave HEW an unenviable task when it explicitly delegated the responsibility of balancing Title IX mandated gender equality and the unique challenges athletics programs create.[181] It stands to reason that HEW should have also taken into consideration well-established constitutional concepts, such as substantive due process under the Equal Protection Clause. Even if HEW, and subsequently the Department of Education, did not anticipate the constitutional conflict between a regulation allowing sex-segregation in contact sports and Equal Protection Clause claims, they have not amended or even attempted to amend the Regulations since 1975.[182]

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[173] Lantz *ex rel.* Lantz v. Ambach, 620 F. Supp. 663, 664 (S.D.N.Y. 1985).

[174] *Id.*

[175] *Id.* at 665.

[176] Sangree, *supra* note 34, at 395.

[177] *Lantz*, 620 F. Supp. 2d at 666.

[178] Greene, *supra* note 172, at 163-64.

[179] *See supra* note 145 and accompanying text.

[180] *See generally supra* notes 126-30 and accompanying text.

Generally speaking, federal courts should not be determining the roster for middle school football tryouts. Case in point, when Force was attempting to join the boys' football team, she wanted to join the seventh grade boys' team.[183] However, based on delays inherent in federal courts and service of process requirements, the entire seventh grade football season had already passed, and the court was litigating whether or not she should be allowed to try out for the eighth grade team.[184] Taking into consideration the seasonal and immediate nature of sports and athletic tryouts, the long dockets and service of process requirements of federal court is not the most effective way to eradicate gender discrimination in school athletic programs. Furthermore, the judgment of Congress and factual realities dictate that the Department of Education is better equipped to handle cross-over cases than the courts.[185] Title IX is a blanket prohibition on discrimination, and the statute's enforcement mechanisms are adjudicatory in nature.[186] If the Department of Education amended the regulations to be in conformity with the Equal Protection Clause, it would have the ability to informally investigate and address Title IX violations as well as hold administrative hearings.[187] The DOE could also withhold an educational institution's federal funding, providing further incentives for school districts to act in conformity with constitutional principles.[188] Since an amendment to the regulations would not deprive students of their Title IX private causes of action or § 1983 constitutional claims, cross-over claim cases would not be completely removed from federal court.[189]

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[181] Greene, *supra* note 172, at 164.

[182] Brake, *supra* note 26, at 46-47.

[183] Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1023 (W.D. Mo. 1983).

[184] *Id.*

[185] *See generally* 20 U.S.C. §§ 1681-1688 (2006).

[186] 20 U.S.C. § 1682 (2006); 34 C.F.R. § 106.71 (2009).

[187] 20 U.S.C. § 1682.

While the present regulations purport to support gender equality, they work more to keep the status quo with regard to contact sports.[190] Title IX's Contact Sports Exemption allows for academic institutions to field coed contact sports teams, but does not require it.[191] Upon the promulgation of the regulation, sporting bodies came up with restrictions excluding females from playing contact sports.[192] Because the Contact Sports Exemption explicitly applied to only sports that are typically male dominated (boxing, wrestling, rugby, ice hockey, football, basketball), the Contact Sports Exemption became a hindrance to the educational equality contemplated by Title IX.[193]

IV. PROPOSED SOLUTIONS

When it comes to Title IX, identifying the shortcomings of the Contact Sports Exemption is easy; coming up with reasonable alternatives is more difficult.

The 50/50 Proposal

Championed by Professor B. Glenn George, the 50/50 proposal calls for the complete elimination of sex-segregated sports.[194] In place of separate-but-equal gender segregated teams, Professor George envisions teams being comprised of half males and half females, with playing time split equally between the sexes to ensure equality.[195] The 50/50 proposal is ambitious, to say the least.

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[188] 34 C.F.R. § 100.8(c).

[189] *See generally* Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

[190] Greene, *supra* note 172, at 170.

[191] 34 C.F.R. § 106.41(b).

[192] Sangree, *supra* note 34, at 436-37.

[193] *Id.* at 437.

[194] George, *supra* note 137, at 1145.

While this regime would more than fix the Contact Sports Exemption dilemma, it does not seem to be grounded in a realistic view of American sports culture. Even Professor George's most adamant supporters pre-empt discussions of the 50/50 proposal with the caveat: "[I]t is necessary to understand that the proposal assumes that . . . sports justify [their] placement in an academic institution by having goals other than to simply field the best team."[196] In addition to the proposal not taking into consideration current American sports culture, adherence to it would require an unrealistic administrative effort. To remain in compliance with Professor George's vision of equality, teams would have to field the exact same numbers of males and females, with an administration making certain that every interscholastic team in the country played its males and female players for equal amounts of time.[197]

Other problems with the 50/50 proposal include destruction of the sports meritocracy.[198] More skilled players might not make the sports team in order to ensure an equal gender balance. Whereas Equal Protection litigation enables girls to try out for male dominated contact sports teams based on ability, the 50/50 proposal would lead to team membership based on quotas.[199]

Completely Separate; Perhaps a Little Less Equal

Professor Deborah Brake also has a radical proposal for addressing the Contact Sports Exemption.[200] Professor Brake advocates a rule that would stipulate a school must attempt to cultivate the appropriate interest and resources in a contact sport if just one woman expresses interest in it.[201] She sees this as an appropriate measure to combat the "interest and ability" barrier, a theory that subscribes to the assumption that women are discriminated against by schools offering programs based on skill level.[202] Professor Brake believes that this will subvert the threat to substantive equality caused by programs being offered on the basis of "interest and ability."[203]

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[195] *Id.* The 50/50 proposal not only calls for equal playing time but also equal number of male and female participants on the playing field. *Id.*

[196] Furman, *supra* note 82, at 1188.

[197] *Id.* at 1189.

[198] *Id.* at 1193-94.

[199] *Id.* at 1193.

[200] Greene, *supra* note 172, at 169.

As a matter of reality, this proposal's grant of equal opportunities to participate in separate sports fits more with the current American sports culture. This theory would also eliminate some of the equality problems caused by the Contact Sports Exemption.

However, it would be hard to reconcile this program with principles of formal equality.[204] It would require that the amount of sports programs for women be constantly in flux according to passing interest. Further, proving that a school is engaged in good faith efforts to cultivate interest and resources in women's contact sports teams would be next to impossible. Finally, this proposal would likely add little to any substantive equality between men and women and would perpetuate the stereotype that women need separate sports teams because *all* of them are incapable of competing athletically with men.[205]

A Formal Equality Approach

A formal equality approach denies that there are any differences between men and women.[206] One formal equality theory is assimilation, which is based on the concept that, if given the opportunity, women could compete at the same level as men.[207] Under assimilationist approaches, the Contact Sports Exemption and the separate teams allowance from Title IX would be abolished.[208] In their place would be a gender-blind meritocracy where teams would be fielded from the school's best athletes.[209]

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[201] Brake, *supra* note 26, at 140.

[202] Greene, *supra* note 172, at 168-69.

[203] *Id.*

[204] *Id.*

[205] *Id.* at 166-67; *see generally* Furman, *supra* note 82, at 1191 (discussing historical protectionalism based on a perceived vulnerability of the female sex).

[206] Furman, *supra* note 82, at 1185.

[207] *Id.*

[208] *See id.*

While formal equality might adhere to the spirit of Title IX legislation, it would significantly reduce the number of females awarded opportunities to play sports over-all.[210] Justice Stevens articulated an attack on formal equality in sports teams by writing, "Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events."[211]

The Olympic Model

An Olympic model is the antithesis to an assimilationist model. The Olympic model is based on an understanding that men and women have fundamental "differences."[212] Under the Olympic model, there would be men's and women's teams in every sport and each team would be provided equivalent financial resources.[213]

While this approach would be acceptable under Title IX and the Equal Protection Clause, it does not account for general differences in preference between genders. This model assumes that there will be enough females interested at every school to play football or ice hockey and that simply might not be the case.

Amendment or Abolishment of the Regulation

Perhaps the most obvious means of addressing the shortcomings of the Contact Sports Exemption is an amendment to the Contact Sports Exemption Clause.

Some legal advocates call for a complete abolishment of the Contact Sports Clause, which would allow for anyone to try out for a sports team based on skill if there was not an equivalent sports team offered for that person's gender.[214]

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[209] *Id.*

[210] *Id.*

[211] O'Connor v. Bd. of Educ. of Sch. Dist. 23, 449 U.S. 1301, 1307 (1980).

[212] Furman, *supra* note 82, at 1186.

[213] *Id.*

[214] *Id.* at 1187.

Advocates of this proposal point to the anti-discrimination purpose of the Title IX statute, and the inherent discrimination in segregated-sex sports teams.[215]

An alternative option is to amend the language of the regulation to only allow women to try out based on ability for male dominated contact sports.[216] This language would reconcile the regulation with many successful Equal Protection claims made by women, while still excluding men from playing sports like volleyball and field hockey. Understanding this solution is not perfect, in this author's opinion, it is the most appropriate.

Realistically, this solution addresses asymmetry of athletic skills, recognizing that males, whether through cultural conditioning or inherent ability, generally have an athletic advantage over females.[217] Exclusion of males from female-dominated contact sports is necessary to prevent the eradication of women's teams.[218] This position, adopted indirectly by many federal courts, concedes that if sex-segregation does not exist in sports, boys cannot be prevented from playing every sport, thus eliminating the vast majority of girls' participation.[219]

Moreover, unlike many other proposed solutions it is consistent with the athletic programs that exist in many schools across the United States. Allowing female students to try out for the football team would not require nearly as much of a monetary or administrative adjustment in athletic programs as the 50/50 proposal or Professor Brake's proposal.[220] It would be relatively easy to implement within the existing framework of district rules and regulations.

Furthermore, this amendment is the very least that is necessary to bring the Title IX regulations in conformity with the successful Equal Protection claims in cross-over cases.[221] Unfortunately, like the Equal Protection jurisprudence itself, boys who wish to play girl dominated contact sports are prevented from doing so. But, exclusionary practices of boys may be a necessary evil to ensure female participation in athletics.[222]

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[215] *Id.*

[216] Greene, *supra* note 172, at 169.

[217] *Id.*

[218] *Id.* at 151.

[219] *Id.*

[220] *See supra* notes 193-204 and accompanying text.

[221] *See supra* notes 73-92 and accompanying text.

Those against amendment or abolishment of the Contact Sports Exemption claim that the changes are not sufficient to bring about gender equality.[223] They claim, at best, that Title IX regulations are an attempt to bring about formal gender equality without substantive equality.[224] In their view, mere abolishment, amendment, or adjustment of the Contact Sports Exception is insufficient.[225] Meanwhile, others are still in opposition to gender equality as defined by Title IX. The same critics of Title IX who supported the Tower Amendment, wanting revenue producing sports exempted from Title IX regulations, and those who put pressure on HEW when drafting Title IX to include the Contact Sports Exemption in the first place, would be opposed to any further adjustments to the regulations.[226]

CONCLUSION

When it comes to cross-over cases, the Contact Sports Exemption is constitutionally problematic, at best. Congress passed Title IX in order to eliminate sex discrimination in schools. However, when promulgating the relevant regulations, HEW incorporated gender stereotypes into regulations that were supposed to eliminate gender discrimination in sports. The Contact Sports Exemption supports stereotypes that suggest girls are only interested in playing contact sports traditionally dominated by girls and that boys are only interested in playing sports traditionally dominated by boys. Federal courts have offered some relief, vis-à-vis the

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[222] Greene, *supra* note 172, at 151.

[223] Furman, *supra* note 82, at 1187.

[224] *Id.*

[225] *Id.*

[226] *See generally* Aaronberg, *supra* note 17, at 751 (discussing the history of the Tower Amendment); Sangree, *supra* note 34, at 416 (quoting *Sex Discrimination Regulations, Hearings before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor,* 94th Cong. 438-39 (1975) (statement of Caspar W. Weinberger, Sec. of Dept. of Health, Educ. and Welfare).

Fourteenth Amendment, to students victimized by the shortcomings of the Contact Sports Exemption. However, litigating little league football tryout rosters is not the most efficient use of the court's time. Nevertheless, given the amount of time that it takes to litigate a cross-over claim, the sports season in which the student wants to play is often finished before the student can obtain a court order to try out based on ability. Even though the Contact Sports Exemption is permissive, it still allows schools to participate in unconstitutional exclusionary practices based on gender. At the very least, the exemption needs to be amended by the Department of Education to address relevant Equal Protection violations. Furthermore, the DOE needs to provide its adjudicatory framework to informally intervene in Title IX violations to dispense swift administrative relief for students who are interested in playing gender atypical sports and are prevented from doing so based on school or district rules. The DOE also needs to employ its power to deprive federal funding from schools that violate the regulations in order to resolve cross-over cases, as an added incentive for schools and districts to respect their students' constitutional rights. The DOE should take into consideration the regulations' impact not only on girls who want to play sports like football and ice hockey but also boys who want to play sports like field hockey and volleyball.

Marielle Elisabet Dirkx